



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### **Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### **About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

PROPERTY OF  
*University of  
Michigan  
Libraries*

1817

ARTES SCIENTIA VERITAS









f.  
Dug.

HUGONIS GROTII  
*DE JURE BELLI ET PACIS*

LIBRI TRES



ACCOMPANIED BY AN ABRIDGED TRANSLATION

BY

WILLIAM WHEWELL D.D.

MASTER OF TRINITY COLLEGE

AND PROFESSOR OF MORAL PHILOSOPHY IN THE UNIVERSITY OF CAMBRIDGE:

WITH THE NOTES OF THE AUTHOR, BARBEYRAC, AND OTHERS.

---

VOLUME THE FIRST

---

Edited for the Syndics of the University Press



CAMBRIDGE.

M.DCCC.LIII.

JOHN W. PARKER, LONDON.

Grad R.R 4

JX

2093

.A1

1853



**JAN 3 1912**

8 1/2



## EDITOR'S PREFACE.

---

“IT is acknowledged by every one,” says Mr Hallam, “that the publication of this treatise made an epoch in the philosophical, and we might almost say in the political history of Europe.” This opinion of the importance of Grotius’s work *De Jure Belli et Pacis*, prevailed from the time of its first appearance, and was exemplified by all the marks of honour with which such a book can be greeted. Numerous editions in various forms circulated rapidly: copious comments of several annotators, translations into several languages, speedily appeared; the work was published in the author’s life-time, *cum notis variorum*, a distinction hitherto reserved to the ancient classics: and it was put into the *Index Expurgatorius* at Rome. Gustavus Adolphus carried it about with him and kept it under his pillow: Oxenstiern appointed its author the ambassador of Sweden at Paris: the Elector Palatine Charles Louis established at Heidelberg a Professorship of the science thus created; and the science has been promoted by the like means in many other places up to the present time.

Nor has it, at this day, ceased to be a book of the first-rate importance in this science. It is spoken of with respect and admiration by the principal modern writers on International Law: a knowledge of it is taken for granted in the discussions of questions belonging to that subject; and it is quoted among the cardinal authorities on such questions. And treating, as it does, of the fundamental points of Philosophical Ethics, as well as of their applica-

tion in the Laws of Nations, it has, in that department also, been always regarded as a primary work. It soon gave rise to Puffendorf's Treatise *On the Laws of Nature and Nations*, and to other books of the same kind; of which some, like our own Rutherford's *Course of Lectures on Grotius*, show the celebrity of the work, by taking from it nothing but the name. Mackintosh, in more than one place, gives to the work the highest terms of his eloquent praise; and how Mr Hallam speaks of it has been mentioned above.

Several objections have, however, been made to the work; and among them, one which I shall especially notice, since an attempt is made in the present edition to remedy the inconvenience thus complained of. It has been said that Grotius's composition is so encumbered, in almost every page, with a multitude of quotations from ancient historians, orators, philosophers and poets, as to confuse the subject, obscure the reasoning, and weary the reader. I am not at all disposed to dissent from what several eminent men have said in answer to this; defending Grotius's quotations, as evidences of men's moral judgments, as appeals to general sympathy, and as graceful literary ornaments; but I am also ready to allow that these citations go to the extent of disturbing the didactic clearness and convenient brevity which we wish to find in a philosophical work. Hence, in the translation with which I have accompanied the text, I have omitted all the quotations except those which were necessary to carry on the argument. By this means, the bulk of the work has been reduced more than one half; while, the names of the authors quoted, being retained in the translation, the reader can, if he chooses, pass to the passages adduced, which he will find on the same page. The translation is thus rather a selective than an abridged translation; for the didactic and argumentative parts are, in general, so

far from being here abridged, that explanatory expressions and clauses are introduced in a great number of passages where they seemed likely to make the meaning clearer.

It appears to me that the scheme and reasoning of Grotius's work are well worthy of being thus carefully presented to the reader. I agree with a former editor, Barbeyrac, that Grotius's learning, wonderful as it was, was far from being the greatest of his qualifications for the task which he undertook. His work is characterized throughout by solid philosophical principles consistently applied; by clear and orderly distinction of parts; by definite and exact notions, improved by the intellectual discipline of legal studies; by a pure and humane morality, always inclining to the higher side in disputed questions; and by a pervading though temperate spirit of religion. It may be doubted whether, even yet, we can place philosophical morality on any better basis than that which he lays down in his *Prolegomena*; namely, the social impulse by which man is actuated, in addition to the desire of his individual good. This social impulse is, he holds, the source of *Jus*, or Natural Law;—the basis of property and contract (Art. 8.) It is, he says, (Art. 16), too narrow a view to say that Utility is the Mother of Rights; the Mother of Rights is Human Nature, taken as a whole, with its impulses of kindness, pity, sociality, as well as its desire of individual pleasure and fear of pain. Human Nature is the Mother of Natural Law, and Natural Law is the Mother of Civil or Instituted Law.

By thus founding Morality and Law upon the whole compass of man's human and social, as well as animal and individual nature, Grotius, as I conceive, makes his system more true and philosophical than many of the more recent schemes of the philosophy of morals. He is thus favourably distinguished, not only from those who, like

savage view which derives law and justice from mutual fear, had not been prominently put forwards in that period, as it was soon afterwards by Hobbes; and Grotius, in debating the question, is driven to seek the opponents of his wider and humaner morality, in the ancient world, among the Grecian sophists. But the miseries arising from unregulated war pressed upon his thoughts with present and severe reality; for the Thirty Years' War had long been ravaging Europe. To this spectacle he himself ascribes the origin of his work. He says (*Proleg.* Art. 28), "I saw prevailing throughout the Christian world a license in making war, of which even barbarous nations would have been ashamed; recourse was had to arms for slight reasons, or for no reason; and when arms were once taken up, all reverence for divine and human law was thrown away; just as if men were thenceforth authorized to commit all crimes without restraint." The sight of these atrocities had led many men, he says, to hold all war to be unlawful to Christians; but he, more temperately, thought that the remedy was to bring it about that war itself should be subject to rules of humanity and decency. And he adds, that he conceived himself in some degree prepared for such a task by the practice of jurisprudence in his own country; and hoped, that, though unworthily ejected from that country, which had been honoured by so many of his works, he might still promote the science by the labours of his pen.

He claims (*Proleg.* 30), to be the first who had reduced International Law to the form of an Art or Science. Nor do I conceive that this claim goes beyond his due: though I am aware that certain writers have been recently brought to light and pointed out as his "Precursors\*." The Precursors thus newly brought into notice are Johannes Oldendorp,

---

\* Die Vorläufer des Hugo Grotius auf dem Gebiete des *Jus Naturæ et Gentium*. Von Carl von Kaltenborn, 1848.

whose *Isagoge Juris Naturalis, Gentium, et Civilis*, was published at Cologne in 1539; Nicolaus Hemming, who wrote *De Lege Naturæ Methodus Apodictica*; Benedict Winkler, whose *Principiorum Juris libri quinque* appeared in 1615, ten years before the publication of the work of Grotius. But I see no reason to think that these works did more to anticipate the work of Grotius than the works which he himself enumerates and criticizes, as bearing upon the subject; especially the work of the Oxford Professor of Law, Albericus Gentilis, *De Jure Belli*, Hanoviæ, 1598. In this work, as Mr Hallam has observed, the titles of the chapters run almost parallel to those of the first and third Books of Grotius; and Grotius himself mentions him (along with Balthasar Ayala), as a writer who had been of great use to him: "Cujus diligentia sicut alios adjuvari posse scio, et me adjutum profiteor," (*Prol.* 38). The work of Ayala, *De Jure et Officiis Bellicis*, published in 1582, is conceived by Mr Hallam to have been the first "that systematically reduced the practice of nations in the conduct of war to legitimate rules." But notwithstanding the labours of these authors, we may, I conceive, fully assent to Mr Hallam, when he says of Grotius's work: "The book may be considered as nearly original, in its general platform, as any work of man in an advanced stage of civilization and learning can be. It is more so, perhaps, than those of Montesquieu and [Adam] Smith."

Mr Dugald Stewart has, in his *Dissertation on the Progress of Philosophy*, spoken unfavourably, indeed contemptuously, of Grotius's great work. I am happily relieved from any necessity of replying to this criticism, by the admirable manner in which the task has already been performed by Mr Hallam. That judicious and temperate writer finds himself compelled to refer to Mr Stewart's attack in these terms: "That he should have spoken of a work so distinguished by fame, and so effective, as he

himself admits, over the public mind of Europe, in terms of unmingled depreciation, without having done more than glanced at some of its pages, is an extraordinary symptom of that tendency towards prejudices, hasty but inveterate, of which that eminent man seems to have been not a little susceptible. The attack made by Stewart on those who have taken the law of nature and nations for their theme, and especially on Grotius, who stands forwards in that list, is protracted for several pages, and it would be tedious to examine every sentence in succession. Were I to do so, it is not, in my opinion, an exaggeration to say that almost every successive sentence would lie open to criticism." He then goes on to take the chief heads of accusation; and to his instructive discussion of them, I refer my reader\*.

Paley also, in the Preface to his *Moral Philosophy*, censures Grotius for the profusion of his classical quotations; an objection of which I have already spoken, and which I have here tried to remedy; and for the forensic cast of his writings. That in the work of Grotius we see everywhere traces of the juristical training of his mind, is not to be denied; but it may be much doubted whether this is a disadvantage;—whether this legal discipline of the intellect have not given a precision to his divisions and reasonings which they would not have had without the habits so formed. Certainly a jurist would find, in Paley himself, great reason to complain that questions of morality and of law are mingled together in a very confused and arbitrary manner.

It was not the intention of Grotius to furnish a System of Ethics. But if we regard the work as to its bearing on ethical philosophy, it will, in many respects, sustain with advantage a comparison with the work of Paley. Grotius

---

\* *Literature of Europe*, Part III. Chap. iv. § 83.

shews, satisfactorily as I conceive, that *utility* is a very narrow and perverse expression for the foundation of morality (*Proleg.* 16). And the foundation which he himself lays, is far broader and more philosophical (*Proleg.* 6). Man, he says, is an excellent animal, differing from other animals, not in degree only but in nature; and among his peculiar excellencies is a desire for society, a desire for a life spent in community with his fellow-men; and not merely spent somehow, but spent tranquilly and as a reasonable being; *communitatis non qualiscunque, sed tranquillæ, et pro sui intellectus modo ordinatæ*. This desire, or impulse, the Stoics called *οἰκείωσις*, the *Domestic Impulse*. We might be tempted to call it the *Domestic Instinct*; but then, we should have to recollect, that precisely one of the peculiarities which we have here to take into account, is, that man is not governed by Instinct, but by Reason; that in virtue of his human nature, the impulses which belong to him, analogous to the instincts of animals, become conscious and intelligent purposes: and thus personal security, property, contracts and the like, the necessary conditions of a tranquil and reasonable community of life, are necessary results of man's nature. And thus human nature is the source of Rights, as Grotius says, (*Proleg.* 16).

That man forms a judgment of actions, and tendencies to act, as being right or wrong; and that the adjective *right* has a wider range than the substantive *Rights*; are doctrines belonging to man's *moral* nature; and these doctrines lead us to a scheme of morality which has its foundations, as a sound scheme of morality must have, at once in the external conditions of man's being, and in the internal nature of his soul. The *Rights* which his outward circumstances necessarily establish, are recognized and made the cardinal points of *Rightness*, by his inward con-

victions. Among the convictions which belong to man, as a moral creature, is this; that not only his outward actions, but his inward purposes, volitions, affections, desires and habits, ought to be right. This consideration, however, leads us into a region of morality with which Grotius is not much concerned in the present work.

Many of the questions of International Law which are discussed by Grotius, have been the subject of much subsequent discussion; and in several cases, the opinions now generally accepted are different from those which he asserts. To have attempted to notice such cases, would have been, not to edit Grotius, but to compile a Treatise on the present state and past history of International Law. The student of such subjects will necessarily have to read many books; of which, however, this of Grotius is certainly one of the most indispensable. What is requisite in order to correct him, must be obtained by studying the best of his successors.

I hope that the deep and earnest love of Peace which inspired the design of this book, and which breathes so ardently through so many of its pages, will obtain a favourable reception for the work, in these days when the same sentiment is so strongly felt and so widely spread, and has shewn itself in so many remarkable ways. The progress of the study of International Law, on such principles as those of Grotius, and the increase of a regard for the authority of such Law, are among the most hopeful avenues to that noble Ideal of the lovers of mankind, a Perpetual Peace:—the most hopeful, because along this avenue, we can already see a long historical progress, as well as a great moral aim. Grotius himself, as was natural with his views, indulged the hope of such a consummation; as appears for instance, Book II. chap. xxiii. Sect. x. Art. 4, where he says: "It would be useful, and indeed it is almost



necessary, that certain Congresses of Christian Powers should be held, in which controversies which arise among some of them may be decided by others who are not interested; and in which measures may be taken to compel the parties to accept peace on equitable terms." I trust that all Students and Professors of International Law will consider themselves as labouring upon a Problem which is still unsolved, while War exists; and in which all the approximate solutions must make wars more rare and more brief, as well as more orderly and more humane.

Notwithstanding the love of peace and the spirit of humanity which thus runs through the work of Grotius, it has been blamed by some, as sanctioning, by its doctrines, many of the most savage usages of war. But this objection can be made, I think, only by those who have not read the book with due attention. It is true, that in certain parts of the Third Book, he states the customary Rules, according to which wars have always been carried on; which Rules allow killing men, taking prisoners, capturing property, laying waste a country, and the like. And these he calls *the Rights of War*; and gives interpretations of the rules which may seem very severe. But this, he himself notes: and when he has performed this part of his task, he forthwith (in Chap. x.) proceeds to say, "I am now going to take from belligerents what I have seemed to grant to them, but have not really granted:" and then he goes on with a series of Chapters, which he calls *Temperamenta*, Restraints as to the exercise of these Rights of War, derived from considerations of humanity, justice, expedience and piety: and by these "temperaments," he divests war of all the cruelty and hardship which are separable from it. Still, some persons appear to be offended at violent and oppressive practices being called *Rights* in any sense. Upon this, I would

remark, that there would be little use in a writer on this subject stating, as the Rights of War, Rules which never have been observed nor acknowledged in any actual war up to the present time. Killing, taking prisoners and making captures, besieging towns, and the like, are of the essence of war: and these are inevitably violent and painful inflictions. If at any time, the rules of such practices have been harsher than they now are, we may say that such Rules were the Rights of war in barbarous and ferocious times: but even in such times, those Rights imposed a certain restraint upon the victor; as for instance, the Right of making the conquered slaves, prevented his taking their lives. That such Rights are often morally wrong, Grotius himself repeatedly urges. The term *Rights*, like the term *Natural Law*, of which I have just spoken, may mean, either that which is secured to men by existing Rules, in every society, however rude; or that which it ought to be the aim of the most humane and pious men to secure by Rule, as the best condition of society. But this latter is not an ordinary nor convenient sense of the substantive *Rights*. If we were to adopt it, we should have a difficulty in establishing the Right of killing men at all for no crime; and therefore, there could be no Rights of War.

The translation may perhaps be welcome, even to the classical scholar, for Grotius's style is not only very concise and pregnant, but also full of expressions borrowed from the jurists and the schoolmen. But as the text will sufficiently explain these, I have not thought it necessary to translate the Notes, which besides, for the most part, refer to the quotations only.

There have already been published at least three translations of Grotius's work in English, besides a small and worthless abridgement, published in 1654 by C. B. (i. e.

Clement Barksdale, according to Watts). William Evats published a translation (in folio) in 1682, in which an attempt was made (not very happily,) to improve the work, by introducing Grotius's Notes, and other matter, into the text. And in 1738, a translation (also in folio), was published of the text of the work, and of the Notes of Barbeyrac; not only the smaller critical Notes which accompany the present edition, but also of the larger Notes, generally of a juristical and historical kind, which Barbeyrac has appended to his French translation. This edition is anonymous, but bears traces of having been executed by a writer familiar with the literature of jurisprudence. Besides these, there is, I believe, a more modern translation, which I have not seen.

I had no opportunity of consulting the translations of 1682 and 1738, till my own translation was completed; and if this had been otherwise, the scheme of my translation is so different, that I should have had no temptation to borrow from them. I have however taken a few Notes from the edition of 1738.

Barbeyrac's critical notes, given in the present edition, are excellent. They are mainly employed in verifying Grotius's quotations: quotations, often, it would seem, made by drawing upon a memory which appears to have contained in its stores the whole mass of ancient literature. Quotations so collected are often confused and imperfect, as well as difficult to trace. The learning, acuteness, vigilance and felicity, with which Barbeyrac has detected, traced to their origin, and rectified, such mistakes as Grotius has committed, are such as may constantly excite the admiration of the reader. Still, it would not have been proper to publish a new edition of the work without again verifying the references; and especially, enabling the reader to refer to modern editions, instead of those which Bar-

beyrac employs. This task has been executed by the Rev. H. A. Holden, Fellow of Trinity College, who has before performed the same valuable service for the recent edition of Sanderson *De Obligatione Conscientiæ*.

The Notes of Gronovius, which occupy a considerable portion of the page of the most common editions of Grotius, are in reality of very little value. It is doubted by Tydman, a more recent editor, (Utrecht, 1773) whether they were intended for publication; and they may in general be omitted without loss. A few notices taken from them have been retained.

As further illustrating Barbeyrac's labours on this work, I have inserted his Preface, including the passage in which he expresses an unfavourable judgment of the value of the Notes of Gronovius. In this preface, the references to Barbeyrac's own Notes are here made according to the mode adopted in the present edition, namely, by means of the Arabic numerals from 1 to 4, the Notes of Grotius being marked by the letters of the alphabet, as in the earlier editions.

TRINITY LODGE, CAMBRIDGE,  
August 23, 1853.

---

VOLUMINE PRIMO CONTINENTUR

	PAG.
DEDICATIO Auctoris Ludovico XIII. M DC XXV . . . . .	xix
Præfatio J. Barbeyracii M DCC XX . . . . .	xxiii
Ejusdem M DCC XXXV . . . . .	xxxv
Prolegomena Auctoris in libros tres <i>de Jure Belli ac Pacis</i>	xxxvii

*LIBER PRIMUS.*

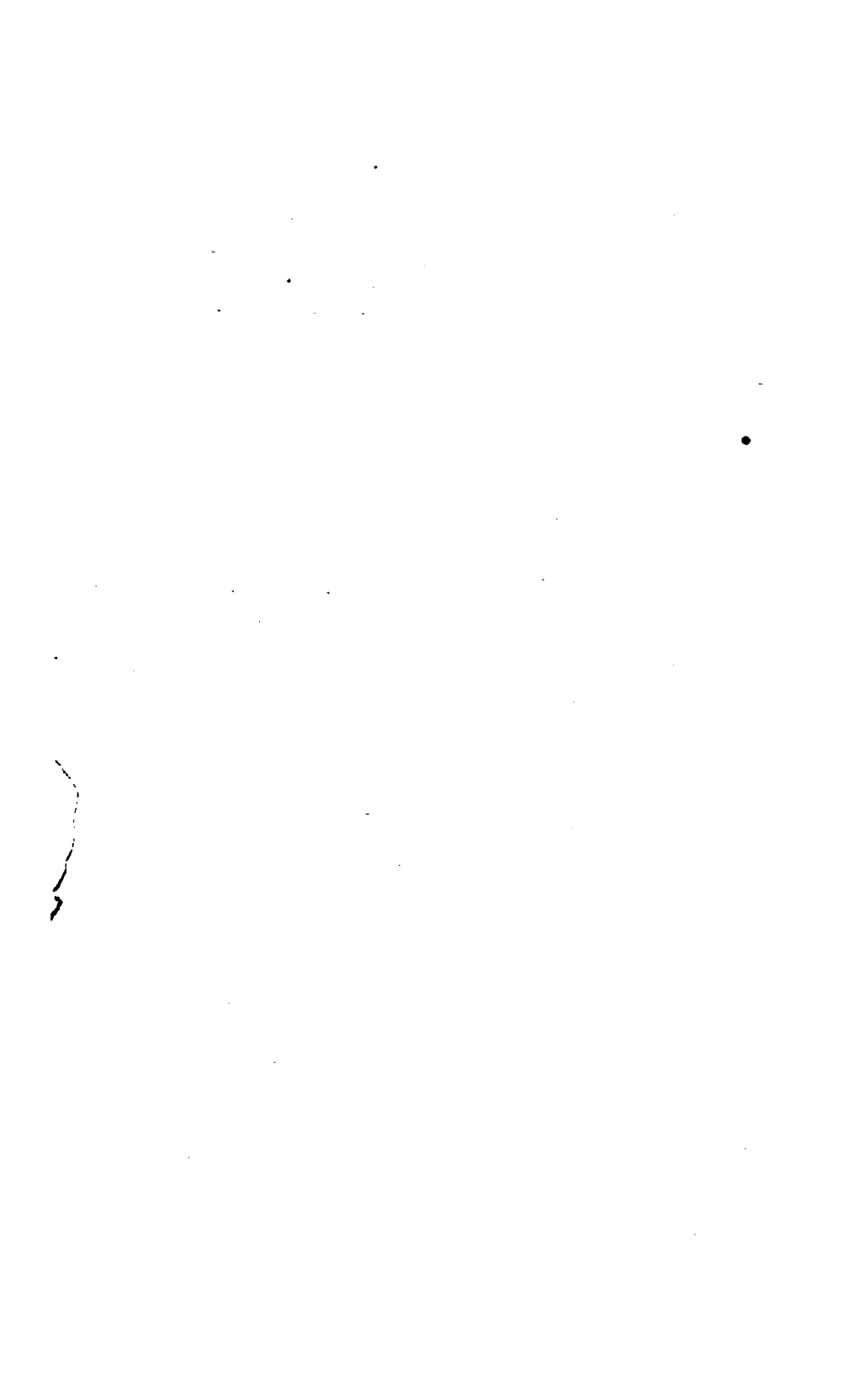
CAP.

I. Quid Bellum, quid Jus . . . . .	1
II. An bellare unquam justum sit . . . . .	29
III. Belli partitio in publicum et privatum. Summi imperii explicatio . . . . .	94
IV. De Bello subditorum in superiores . . . . .	164

*LIBRI SECUNDI*

CAPITA I—VIII.

I. De Belli Causis, et primum de defensione sui et rerum.	201
II. De his, quæ hominibus communiter competunt . . . . .	227
III. De Acquisitione originaria rerum, ubi de mari et fluminibus . . . . .	255
IV. De Derelictione præsumta, et eam secuta occupatione, et quid ab usucapione et præscriptione differat . . . . .	276
V. De Acquisitione originaria juris in personas: ubi de Jure Parentum: de Matrimoniis: de Collegiis: de Jure in Subditos: Servos . . . . .	294
VI. De Acquisitione derivativa facto hominis, ubi de alienatione imperii, et rerum imperii . . . . .	340
VII. De Acquisitione derivativa, quæ fit per legem, ubi de successionibus ab intestato . . . . .	351
VIII. De Acquisitionibus, quæ vulgo dicuntur Juris Gentium	394



# LUDOVICO XIII

CHRISTIANISSIMO FRANCORUM ET NAVARRÆ REGI

HUGO GROTIUS.

---

**A**UDET hic liber, Regum eminentissime, Tuum sibi augustum nomen inscribere, non sui, non Auctoris, sed argumenti fiducia, pro *Justitia* quippe scriptus: quæ virtus adeo Tua est, ut inde tuis meritis et humani generis suffragio dignissimum tanto Rege cognomentum acceperis, ut jam ubique *Justi* appellatione non minus quam Ludovici noscaris. Speciosi Romanis Ducibus videbantur ex Creta, Numidia, Africa, Asia, aliisque devictis gentibus tituli. At quanto Tuum illustrius, quo significaris nullius populi, nullius hominis, sed ejus, quod injustum est, et hostis ubique, et victor semper? Magnum putarunt *Ægyptii* reges, si patris hic, matris ille, fratrum amans alius dicerentur. At quantulæ hæ partes sunt Tui nominis, quod non ista tantum, sed quicquid pulchrum et honestum excogitari potest, ambitu suo complectitur: *Justus* es, cum Magni supra omne id quod dici potest Regis Patris Tui memoriam honoras ipsum imitando: *Justus*, cum Fratrem modis omnibus, sed nulla re magis quam exemplo tuo instruis: *Justus*, cum Sorores summis matrimoniis ornas: *Justus*, cum sepultas prope leges revocas, et, quantum potes, ruenti in pejus seculo temet opponis: *Justus*, sed simul clemens, cum subditis, quos tuæ bonitatis ignorantia ab officii limite transversos egerat, præter peccandi licentiam nihil adimis, nec vim adfers animis circa divina

diversum à te sentientibus: Justus simulque misericors, cum oppressos populos, afflictos Principes tua auctoritate relevas, nec fortunæ nimium licere permittis. Quæ tua singularis beneficentia, et in tantum Deo similis, quantum humana natura patitur, me cogit, ut hac quoque publica allocutione gratias tibi pro me privatim habeam. Nam quemadmodum cœlestia sidera non tantum magnis mundi partibus se infundunt, sed ad singula animantia vim suam patiuntur descendere; ita Tu, in terris benignissimum sidus, non contentus erigere Principes, sublevare populos, mihi quoque in patria male habito et præsidium voluisti esse et solatium. Accedit ad implendum Justitiæ orbem post actiones publicas etiam privatæ vitæ tuæ innocentia et puritas, digna, quam non homines tantum, sed et ætheriæ mentes admirentur. Nam quotusquisque de plebe infima, imo de ipsis illis, qui a mundi consortio se absciderunt, ita se ab omnibus culpis immunem præstat, ut Tu in ea positus fortuna, quæ innumeris peccandi illecebris undique obsidetur? Quantum vero hoc est, inter negotia, in turba, in aula, inter tot tam diversa peccantium exempla id consequi, quod aliis solitudo vix, sæpe ne vix quidem, præstat? Hoc vero est non Justi tantum, sed et Sancti nomen in hac ipsa vita mereri, quod majoribus tuis Carolo Magno et Ludovico piorum consensus post obitum tribuit: hoc est esse non gentilitio sed suo proprio jure Christianissimum. Sed Justitiæ cum pars nulla a te aliena sit, illa tamen, quæ circa libri hujus materiam, id est, circa belli pacisque consilia versatur, eo proprie tua est, quo Rex es, et quidem Rex Francorum. Ingens hoc regnum tuum, quod per tanta tam felicium terrarum spatia in utrumque mare procurrit; sed majus hoc regno regnum est, quod regna aliena non concupiscis. Dignum hoc tua pietate, dignum isto fastigio, non cujusquam jus armis attentare, non veteres turbare fines; sed in bello pacis gerere negotium, nec incipere nisi hoc voto, ut quamprimum desinas.



Quam vero pulchrum hoc, quam gloriosum, quam ipsi conscientiae lætum, ut si quando Te Deus ad suum regnum, quod solum tuo melius est, vocaverit, audacter possis dicere: Hunc ego a Te gladium pro Justitiæ tutela accepi, hunc tibi nullius temere fusi sanguinis reum, purum, inson-temque reddo. Ita fiet, ut quas nos nunc regulas ex libris petimus, in posterum ex Tuis actionibus tanquam ex perfectissimo exemplari petantur. Quod ipsum cum sit maximum, plus tamen aliquid a Te exigere audent Christianorum populi: ut scilicet extinctis ubique armis pax sua non imperiis tantum, sed et Ecclesiis Te Auctore redeat, discatque nostra ætas arbitrium subire ejus ætatis, quam vera sinceraque fide Christianam fuisse Christiani omnes profiteamur. Pertæsos discordiarum animos excitat in hanc spem recens contracta inter Te et sapientissimum pacisque illius sanctæ amantissimum Magnæ Britannæ Regem amicitia, et auspicatissimo Sororis Tuæ matrimonio fæderata. Difficile negotium, propter studia partium gliscentibus in dies odiis<sup>o</sup> inflammata: sed tantis Regibus nihil dignum, nisi quod difficile, nisi quod aliis omnibus desperatum. Deus pacis, Deus justitiæ, Rex juste, Rex pacifice, cum aliis bonis omnibus tum hac etiam laude cumulet Tuam Suæ proximam Majestatem. oIo Io c xxv.

---



# LECTURIS<sup>1</sup>

HANC NOVAM EDITIONEM

S. P. D.

JOANNES BARBEYRACIUS.

---

QUUM in eo essent Bibliopolæ sollertissimi, ut eximium istud Opus, sæpius recusum et recudendum, typis suis iterum committerent; ac in eo emaculando et interpretando non parum operæ a me positum esse inaudivissent: mecum ultro egerunt, ut suppeditare vellent, si quid ad novam Editionem ornandam conferre commodum esset. Lubens amplexus sum occasionem oblatam de illis bene merendi, qui Jus Naturæ et Gentium, pro merito ejus suaque ipsorum utilitate, amplectuntur, adeoque non possunt non maximi facere Auctorem nostrum, nobillissimæ artis quasi parentem. Et quamquam paullo plus temporis mihi relinqui, quam ferebant rationes Typographorum, valde optassem: tamen vel sic ea præstare me posse existimavi, de quibus suscipiendis nemo hactenus, quod sciam, serio cogitaverat. Rem omnem paucis accipe.

Dum ab aliquot annis, *Lausanzæ* adhuc degens, in eo totus eram, ut Libros hosce *De Jure Belli ac Pacis* in Gallicam linguam verterem, et Notis perpetuis illustrarem, ad eum fere modum, quo adfines Opus SAMUELIS PUFENDORFII *De Jure Naturæ et Gentium*, plus simplici vice, jam in publicum emisi: necessarium mihi aliquatenus visum est, utilissimum saltem instituto meo felicius perficiendo, veteres Editiones Grotiani scripti, quæ præsertim vivo Auctore lucem viderunt, mihi comparare, et cum novissimis, quæ solæ omnium manibus teruntur, adcurate conferre. Nimirum sæpius observaveram, ejusmodi Librorum, quorum usus et pretium postulat, ut identidem repetitis vicibus præla exerceant, Editiones ultimas minus ac minus tersas purgatasque prodire ut plurimum: tantum abest ut sint emendatiores,

---

<sup>1</sup> Præfatio Editoris in priorem Editionem Anni 1720. Cui subjicitur monitum de editione posteriore.

quemadmodum titulus vulgo ementitur. Neque heic aliter sese rem habuisse deprehendi. Immo priores illas et optimas, quæ ad recentiores emendandas plurimum juvabant, ipsas haud raro manu medica egere, certissimis argumentis comperi.

Usui mihi maxime fuit, quod adinet ad ipsum Opus, sine Notis Auctoris, quæ postea accesserunt, prima omnium Editio, quæ sub ipsius Auctoris oculis prodiit *Lutetiæ Parisiorum*, anno *Æræ vulgaris* M. DC. XXV. Magnum deinde adjumentum adtulit illa anni M. DC. XXXII. minore forma typisque nitidissimis *Amstelodami* excusa, apud *Gulielmum Blæu*, et expressa ad exemplar ab ipso Auctore recognitum atque emendatum, ut idem præsens *Amstelodami*, die 8 *Aprilis* ejusdem anni, testatur, in pagina post titulum aversa. Ex illis duabus Editionibus, aut ex alterutra, plurima loca emendavimus, quæ in omnibus vel plerisque posterioribus vitiosa erant. De talibus autem emendationibus aliquando occasione data, vel ubi consultum videbatur, monuimus: sed omnes indicare, superflue cujusdam fuisset diligentie; nec patiebatur Lectorum commoditas, ut his et aliis hujusmodi moles voluminis augetur. Ut tamen, quid hac in parte præstiterimus, Lectori manifestum fiat, aliquod heic specimen exhibere placuit locorum, quæ tacitus, optimis Editionibus præeuntibus, correxi.

Non diu quærenda erunt exempla. Offert se statim Lib. I. cap. III. § 17. num. 2. init. *Multi adversus talem statum quasi bicipitem incommoda multa* ADFERUNT. Ita reposuimus ex prima Editione, quum in aliis omnibus perperam legatur *deferunt*. Lib. II. cap. v. § 9. num. 4. *Quod si qui populi continentius egerunt, ut Romani, etc.* Vox *qui*, manifesto necessaria, ex omnibus Editionibus, post illam primam, hactenus abfuerat. Eodem capite § 13. num. 1. eandem ducem sequutus, verba sequentia ita edi jussi: *Colligi videtur ex illis Dei verbis* APUD *Mosem, etc.* quum in aliis omnibus antea scriptum fuisset *ad Mosem*. Similiter Lib. II. cap. XI. § 18. num. 1. in fine: *Naturaliter videtur mihi* ACCEPTANTI *jus dari efficiendi, ut, &c.* Illud *acceptanti* ex Editione prima restitutum est: ultimæ *acceptando* fecerant ex *acceptandi*, quod in Editionem anni 1632 prave irrepererat. Ejusdem Lib. cap. XX. § 40. num. 1. *sub init.*: *Sed et ob eas, quæ ipsos peculiariter non tangunt, sed in quibusvis personis jus naturæ aut gentium immaniter* VIOLANT. Sic edidimus, ex Editione prima, et altera anni 1632 reliquæ enim omnes illud *violant* in *violantibus* aux-

erant, contra id quod series orationis et sententia manifesto postulabant. Aliquando etiam plures exciderant voces, sensum plenum efficientes: cujus παραράματος exempla videre poteris paullo post locum jam jam adlatum, ubi monuimus, in Nota 7. et cap. xxiii. Lib. II. § 13. num. 1. ut ostendit Nota 1 ibi subjecta. Neque enim Auctori ulla erat ratio tales sententias postea ejiciendi: in quod ante omnia adcuratissime inquisivimus heic et alibi, quotiescumque aliquid quacumque de caussa mutandum aut suppleendum videbatur.

Hoc primum. Quod, quamvis in se spectatum non leve sit, et solum ad commendandam Editionem nostram sic satisfacturum erat: parum tamen est, si cum iis conferatur, quæ sine ullo auxilio, et ex proprio nostro Marte, exsequuti sumus, tum in contextu, tum in Notis Auctoris recensendis et expendendis. Præcipua breviter enumerabimus: unde Lector æquus et benignus facile judicare poterit, an operam nostram ultra modum venditemus.

Igitur non pauca loca immutavimus aut supplevimus, quæ in omnibus Editionibus mendosa aut manca erant, et adtendenti non possunt non talia videri: sive error aut defectus a calamo Auctoris ipsius orti sint, sive ab Exscriptorum aut Typographorum incuria, oculos Auctoris, dum raptim verba perlustrat, in repetitis etiam operis sui recensionibus, postea fallente. Exempla indicavimus Lib. I. cap. i. § 16. num. 7, nota 9; et cap. ii. § 10, num. 4, nota 7: cap. iii. § 11. num. 1, nota 5; et § 16. num. 5, nota 8. Lib. II. cap. xii. § 10, nota 4 et cap. xx. § 40. num. 4, nota 1. Lib. III. cap. xiii. § 1, nota 2. Sed non minus necessaria erat emendatio aut additio in aliis locis; ubi non monuimus. En heic etiam specimina nonnulla. Lib. I. cap. ii. § 8. num. 4. *περὶ χρυσίου διαφέρεισθαι*. Ita edidimus, ut habet PHILOSTRATUS, cujus hæc sunt verba, et ipsius Auctoris versio postulat: antea legebatur *διαλέγεσθαι*, quod mendum ab Editione anni 1632. ubi locus additus fuerat, ad omnes postea Editiones propagatum. Lib. II. cap. v. § 22, bis emendavimus *Cibyra*, ex STRABONE, unde narratio facti petita est, pro *Libyca*, quod omnes Editiones insederat, ab ipsa usque anni 1632, cujus etiam hoc erat additamentum. Sequenti § 23. prima Editio, et omnes aliæ hactenus habuerant: *τοὺς νόμους ἀπαγορεύειν*, etc., ubi ex ARISTOTELE reposuimus *ἀγορεύειν*, ut res ipsa requirit, et Auctoris interpretatio, alias contrarium sensum voci Græcæ habitura. Lib. II. cap. iv. § 3 circa

initium: *Non fuerat congruum naturæ humanæ, quæ nisi ex signis ANIMI actus cognoscere non potest.* Vocem animi addidi, quæ in præcedentibus legitur, nec sine damno sententiæ hinc abesse potest; aberat tamen jam in prima Editione. Ejusdem Lib. cap. IX. § 7. in fine: *contra eos a communi sociorum CONCILIO res judicata est.* Vox *concilio*, omnino necessaria, in Editione anni 1632. ubi exemplum additum, exciderat: unde nil mirum, si in nulla sequentium hactenus suppleta fuerit. Sic cap. X. sequenti, § 6: *Quarto non teneri eum ad RESTITUENDOS fructus, etc.* omissionem vocis *restituendos*, adeo manifestam, quum in primam Editionem irrepsisset, omnes deinceps religiose servaverant. Non ita obvia, sed tamen adtendenti ad seriem orationis facile patere poterat ea, quæ reperiebatur ejusdem Libri cap. XII. § 12. num. 1. *Ut etiamsi nec celatum quidquam sit, etc.* si in re tamen *deprehendatur inæqualitas, etc.* Particulâ *si* in omnibus Editionibus deerat, quæ tamen ad ratiocinationis nexum omnino est necessaria. Cap. XXI. § 11. *init. occasione quidem alicujus peccati ALIENI, etc.* Illud *alieni* in nulla hactenus Editione comparuerat; quod tamen sententia manifesto postulat. Aliquando verba supervacanea relicta fuerant, quæ sensum turbabant: cujus rei exemplum luculentum, videre poteris Lib. II. cap. VII. § 2. num. 1, nota (c). Sensui etiam nonnunquam nocuerat prava interpunctio, constanter servata: adeo ut, propter tale vitium, Lib. III. cap. XI. § 6. num. 1: *Phœnces, in Græcia, consanguinei statuuntur Cæritum in Etruria,* ac propterea Auctor noster a GRONOVIO carpatur, et hic se ipsum inanibus conjecturis, ad detegendum fontem erroris, torqueat; ut ex iis, quæ Notæ illius 47 subjeci, cuivis intelligere licet. Sed hæc abunde sufficiunt, ad ostendendum quam necessaria fuerit opera nostra, in emaculandis et restituendis locis non paucis posita, ubi nullum erat a prioribus et emendatissimis Editionibus subsidium.

Præterea rem prope immensi laboris adgressus sum, ad quam nullus horum Librorum Interpres, et ne quidem eruditissimus J. FRIDERICUS GRONOVIVS, umquam data opera animum intenderant, sed tantum prout memoria suggerebat, aut aliud agendo dabatur occasio: ut nimirum omnia loca Scriptorum, Veterum præsertim, quæ ab Auctore nostro adferuntur aut indicantur, in ipsis fontibus, quantum fieri posset, quærerem, et plerumque accurate expenderem. Hoc autem, ut utilissimum, aliquando etiam valde necessarium erat ad mentem Auctoris intelligendam:

ita ad infinitos errores animadvertendos, tum in numeris Librorum, Caputum, Versuum, tum in designatione Scriptorum laudatorum, tum in verbis eorum referendis, tum in rebus ipsis, plurimum mihi profuit, et Lectoribus, spero, commodum erit. Qui Editionem nostram cum quibusvis aliis conferre voluerit, is statim deprehendet innumera ejusmodi passim emendata, et in ipso contextu, et in margine, et in Notis, etiam ubi Auctori propositum erat quam accuratissime loca in testimonium aut illustrationem adducta referre, et facillima quærentibus reddere. Aliquando mendum erat in numero Libri, nonnumquam in numero Capituli aut Versus, haud raro in utroque. Interdum etiam unum Opus Auctoris cujusdam pro alio indicabatur; exempli gratia, PLUTARCHI *Themistoclis* Vita, pro *Artaxerxis*; Lib. I. cap. III. § 16. num. 3. HERODOTI *Urania*, seu Lib. VIII. pro *Calliope*, seu Lib. IX. laudabatur, Lib. III. cap. XI. § 3. num. 2. Ubi, quod obiter observo, error inde manasse videtur, quod Editio Herodotea HENRICI STEPHANI, pure Græca, qua Auctor noster utebatur, sic mendosa sit in titulo paginæ, unde locus adlatus depromptus fuit: quo modo potuit alibi nonnumquam Auctor deceptus in errorem Lectores conjicere: plerique tamen ex ipsius festinatione aut incogitantia nati videntur. Sic ab ipsius manu omnino est, quod Lib. II. cap. XXI. § 13. num. 2, nota (n) PHILONIS scriptum laudetur *De Pietate*, quod nullum exstat, pro libro *De Nobilitate*; ut ibidem observavi. Ejusdem Libri cap. præcedenti XX. § 30, nota (r) remittitur ad *verba Lucæ apud Xiphilinum*; quæ verba sunt *Marci Antonini* Imp. ut in subjecta Nota nostra ostendimus. Sed est etiam ubi Scriptor unus pro alio certissime indicatur: ut ISOCRATES, pro DIONYSIO HALICARNASSENSIS, Lib. II. cap. IV. § 2. ubi vide notam 1; alibi, pro ÆSCHINE, cap. XXIII. § 8. num. 1. ut patet ex Nota 5. Vicissim DEMOSTHENES pro ISOCRATE, Lib. II. cap. XV. § 6. num. 1. Alias HIPPODAMUS, pro HIPPARCHO, Lib. II. cap. V. § 12. num. 3. LYSIAS, pro ANDOCIDE, *ibid.* § 13. num. 2. SENECA, pro PLINIO, Lib. II. cap. II. § 2. num. 2. nota (o). JUSTINUS, pro CURTIO, ejusdem Libri cap. VII. § 9. num. 3. ubi vide, quæ subjecimus notæ<sup>1</sup> 62. Immo EUTROPIUS, Auctor *Breviarii* Latini, pro DIONE CASSIO *Historico Græco* testis indicatur vocis Ἀντιψυχοι, de Vadibus usurpatæ, Lib. II. cap. XXI. § 11,

[<sup>1</sup> Gronovianam dicit; notat autem l. c. Barbeyracius, ea quæ Justino Lib. x. tribuit Grotius, revera Q. Curtii esse, Lib. x. cap. vii. n. 2. H. A. H.]

nota (k). Aliquando duo loca diversorum Scriptorum in unum compinguntur, ut *SERVII* et *SENECÆ*, Lib. II. cap. II. § 13. num. 5, nota (p).

Sæpissime autem Auctor, unde aliquid petitur, simpliciter nomine suo indicabatur, nulla mentione facta: Operis, Libri, nedum Capituli aut Versus; adeo ut, si quis locum quærere voluerit, quem numquam legerat, aut cujus non meminerat, omnia Opera laudati Scriptoris ei pervolvenda fuerint: quod ita molestum est, præsertim si magnæ molis sit collectio, qualis haud raro occurrit, ut plerique Lectores malint Auctori, forte perperam alios in testimonium vocanti, fidem habere, aut rem, de qua agitur, non satis intelligere, quam tantum laborem quærendi in se suscipere, cum periculo etiam operæ frustra impensæ. Aliquando equidem, vel ex Indicibus, vel ex memoria nostra, vel ex re ipsa, loca quædam haud ita difficulter potuimus invenire. Sed plerumque inde nihil nobis erat subsidii, ut ex propria experientia quivis, si velit, facile poterit intelligere. Hoc tamen non obstat, quominus loca fere omnia, quæ alicujus erant momenti, citius aut serius invenerimus: adeo ut quæ adhuc invenienda supersunt, aut a nobis investigari non potuerunt, quod Libri, unde adducuntur, non essent ad manum, paucissima sint, præ maximo numero repertorum, et accuratissime a nobis vel in ipso contextu, vel in margine, vel in Notis, designatorum. Nonnumquam ipsum nomen Scriptoris, ex quo verba quædam Auctor noster exscripserat, incuria nescio cujus, omissum fuerat, ut *DIODORI SICULI*, Lib. II. cap. xx. § 30, nota (s). Sunt etiam loca, quæ diu frustra quæsita, quantumvis pertinaci labore, numquam reperire potuissemus, nisi forte aliud agendo sese nobis ex improviso obtulissent. Et tamen talia interdum pessime adlata, aut aptata, deprehendimus: cujus rei specimen suppeditabit fragmentum *Dionysii Milesii* apud *PHILOSTRATUM*, unde Auctor noster tacitus illud retulerat, Lib. II. cap. xxv. § 9. num. 1. ubi vide notam 8.

Sed et alibi, sive facile, sive difficulter loca laudata inventa a nobis fuerint, errores bene multos observavimus, tum in locis Auctorum exscribendis aut vertendis, tum in eorum ad rem ipsam, de qua agitur, adcommodatione. Horum omnium exempla volumen aperienti statim sese offerent. Loci simul perperam descripti et versi unum indicare suffecerit: is est *JOSEPHI*, cujus verba referuntur Lib. I. cap. iv. § 7, nota (y). Auctor noster, ut probet, secundum quosdam, spem resurrectionis causam fuisse



introducitur moris sepeliendorum corporum, Lib. II. cap. XIX. § 2. num. 3. locum adfert PLINII, qui tamen nil habet, quod ad rem faciat. Eodem Capite, § 3. num. 2, sepulturam deberi mortuis, inter alia, probatur ex juramento *Græcorum* adversus *Persas* militantium, ubi tamen de sociis solis agitur, ut patet ex loco DIODORI SICULI, quem Auctor noster in animo habuit, et ego adduxi in nota 8. Unde etiam exemplum petere potes curæ non pœnitendæ in toto isto Opere passim adhibetæ, ut scilicet multa ex Historiis et Antiquitate, sine teste, sine auctore, prolata, ubinam reperirentur, indicarem, quotiescumque res alicujus erat momenti, nec omnibus obvia. Aliquando facta vel dicta diversorum, aut diversa, inter se confunduntur. Sic Lib. II. cap. XXII. § 1. num. 2. ex LIVIO dicitur, *Antiochum*, falso aliquo prætextu, in *Romanos* bella suscepisse; ubi tamen de *Bœotia* agitur, non de illo Rege. *Brasidæ* Lacedæmonio tribuitur cavillatio, quæ Præconis est, ab *Atheniensibus* missi, Lib. II. cap. XVI. § 6. Ubi de bello *C. Jul. Cæsaris*, cum *Germanis* sermo fit, Lib. I. cap. III. § 5. num. 4. confunditur prælium adversus *Usipetes* et *Tencheros* commissum, antequam *Cæsar* primum ponte *Rhenum* trajiceret, cum victoria, fere biennio post, de *Treviris* ab ipso relata: simulque caussa, propter quam *Cæsarem* dedi *Germanis* censuerat *Cato*, pervertitur. Nonnumquam una eademque res bis, tamquam diversa, narratur, ut judicium *Arriani* de vindicta *Alexandri* in *Persas*, Lib. II. cap. XXI. § 8. num. 2, ubi vide notam 9. Immo est ubi Auctor noster contrarium plane adserit ejus, quod dicitur in loco, unde palam vel tacite hausit id, quod statuit. Exempli gratia, Lib. II. cap. VII. § 4. num. 3. vult, *Solonem* legibus suis cavisse, ne Parentes tenerentur Liberis naturalibus aliquid relinquere; quum tamen Legislator ille tales Liberos contra solverit necessitate alendorum Parentum, ut patet ex PLUTARCHO, cujus locum adduxi in nota 5: nam et aliquid de facultatibus paternis Nothis relinqui debuisse, constat ex iis quæ habet JOANNES MEURSIUS, *Themid. Attic.* Lib. II. cap. XII. Talia παραράματα, aut ἀμαρτήματα μνημονικά, aliquando plura intra paucas lineas occurrunt, ut Lib. I. cap. III. § 8. num. 7, nota (x). Et illis scatent capp. XVIII. et XIX. Lib. II. quemadmodum ex speciminibus ibi adlatis adparet, et Notæ nostræ Gallicæ copiosius ostendent.

In iis omnibus aliquid humani passum esse Virum Summum, si quis miretur, ego vicissim mirabor, quod ei in mentem non

venerit, hoc esse vitium commune omnium hominum, etiam Eru-  
ditissimorum, ut non semper ad omnia satis attendant. Præterea  
id nostro accidit, quod iis solenne est, qui magna memoria pollent,  
ut scilicet illi nimis secure confidant. Adde quod variis distrac-  
tus negotiis et studiis, eo tempore sic satis brevi, quod in hoc  
opere elaborando consumsit, forte etiam non paucis eorum Li-  
brorum, quos tanto numero laudavit, destitutus; non potuit  
semper accurate omnia expendere. Hinc licet infinita ejus esset  
lectio, et vix ullum, puto, Auctorem indicaverit, cujus scripta non  
perlegisset, aut saltem perlustrasset; aliquando loca quædam ex  
aliis, tunc minime inspecta, tacitus exscripsit, et sic in errorem  
delapsus est, ut ex certissimis indicîis deprehendi. Exemplum  
manifestum habes Lib. II. cap. xviii. § 1. nota (a). ubi verba  
CUJACII pro verbis VARRONIS adfert, errantem sequutus DIONY-  
SIUM GOTHOFREDUM in *L. 17. D. De Legationib.* ut alibi eodem  
festinanter lecto, etymologiam vocis *Territorium*, a *terra* peti-  
tam, FRONTINO tribuit, quæ CUJACII etiam est, Lib. III. cap. vi.  
§ 4. num. 2. Sic Lib. I. cap. ii. § 3. num. 2. verba, tamquam  
PLINII, refert, quorum pars tantum apud illum scriptorem legitur,  
ut in nota 5 ibi monui. Post Notam illam autem typis man-  
datam, casu reperi fontem erroris, in MARCI LYCKLAMA, Juris-  
consulti Frisii, *Membranis*, quæ anno 1608 prodierant, Lib. VII.  
*Eclog.* xlii. pag. 394, ubi conjunctio illa duorum locorum per-  
peram facta eodem plane modo legitur.

Neque talia, aut etiam graviora peccata, ad res ipsas spec-  
tantia, sine exprobratione notari, Auctor ipse, si in vivis esset,  
ægre ferret. Quin potius, quo erat ingenio, monentibus gratias  
habiturum et acturum fuisse, mihi persuasum est. Nonnulla  
ipse, postquam animadvertit, statim emendavit, ut ex compara-  
tione priorum Editionum aliquoties observavi. Exempli gratia,  
Lib. II. cap. xxiv. § 3. num. 1. in prima Editione JOSEPHO  
verba tribuebat, quæ PHILONI postea restituit. Lib. II. cap.  
xviii. § 7. in eadem Editione, ubi dictum quoddam *Scipionis* ex  
LIVIO narraverat, a VALERIO MAXIMO *hanc ei tributam vocem*  
*addebat: Isto te metu, Hanno, fides civitatis nostræ liberat.*  
Distinxit deinde sic, quæ male confuderat: *Valerius Maximus*  
*Consulibus Romanis in facto simili, sed antiquiore, hanc tribuit*  
*vocem; Isto te metu, etc.* Lib. II. cap. xv. § 3. num. 1. de loco  
SENÆCÆ Patris ita habet prima Editio: *Non ad antiquos illos*  
*Imperatores pertinet, id est, belli duces, sed ad Cæsares, qui*

*ius omne populi in se transferebant. At nunc ibi contra legimus: Ad antiquos eos pertinet, qui speciale ejus rei mandatum acceperant.*

Libere igitur, sed modeste, ejusmodi *maculas*, a nobis observatas, *quas aut incuria fudit, aut humana parum cavit natura*, ad utilitatem Lectorum, indicare nos posse putavimus, salvo honore Viri Magni, cujus eruditionem, ingenium, judicium, virtutes, nemo est qui pluris faciat, quam nos. Neque heic substitimus: sed etiam, sicubi nobis haud satis recte ratiocinari visus est, aut principia parum firma ponere (quod non potuit non aliquando evenire illi, qui in vastissima disciplina, arte et via, tradenda, glaciem frangebat,) id simpliciter et candide monuimus in *Notulis* nostris; de quibus jam aliquid dicendum, ut, quales illæ sint, et quid in illis quæri debeat, quisque scire possit.

Et primo quidem, ut ipsa appellatio statim innuit, in eis quam brevissime, quæ dicendæ erant exprimere mihi propositum fuit, ne moles voluminis, jam satis spissi, nimis augetur: quæ de causa etiam nonnulla, quæ, in contextu jam posita, noster immemor in Notis suis, totidem verbis, aut eodem plane sensu, repetierat, audacter expunximus.

Duplicis autem generis sunt *Notulæ* nostræ, in universum spectatæ. Aliæ enim, quas *criticas* vocare licet, in eo positæ sunt, ut vel rationem emendationum aut supplementorum, ubi id consultum visum est, reddant; vel Auctoris *παροράματα* in male referendis aut aptandis verbis Scriptorum laudatorum, quando etiam utile existimavi, indicent; vel originem errorum ejus ostendant; vel sine teste prolata idoneis auctoritatibus firment, aut alia ejusmodi doceant. Interdum etiam, sed raro et obiter, natas mihi conjecturas proposui, de emendandis locis Veterum quibusdam, quæ in ipsis fontibus vitiosa videbantur. Alterius vero generis *Notulæ* nostræ *ad res ipsas pertinent*, et in eis modo Auctoris mentem, ubi obscurior, etiam adtentibus, esse potest, breviter exposui; modo ejus errores, circa principia, aut ratiocinationes, indicavi, in præcipuis saltem argumentis. Neque enim ratio brevitatis, jam adlata, patiebatur ut omnia expenderem, aut quidquam fusius deducere. Hinc sæpissime satis facere me posse putavi, Lectorem tantum remittendo, vel ad Opus eximium PUFENDORFII *De Jure Nat. et Gent.* ac nostras in eum Gallice versum *Notas*, jam plus semel editas; vel ad ejusdem Libri Compendium, cui titulus, *De Officio Hominis et Civis*, nostris etiam Notis Gallice illustratum, et sæpius recusum; vel ad *Notas*

nostras in hos ipsos Libros *De Jure Belli ac Pacis*, qui Gallice versi, haud ita post longum tempus, Deo dante, publici juris fient. Ex illis Versionibus nostris, ita adornatis, peti poterit, ut speramus, justus in utrumque Auctorem Commentarius, qui et ad intelligendos duos illos Juris Naturalis et Gentium Interpretes palmarios, et ad intima nobilissimæ utilissimæque disciplinæ adyta penetranda, nisi fallor, satis erit; viam certe facilem sternet. Commentatores autem, quos satis multos, nonnullos molis haud exiguæ, noster hic habuit, quam parum nobis adjumenti in toto isto negotio adtulerint, ex collatione patebit; et de eo aliquid forte dicemus in Præfatione ad Versionem jam memoratam. Necessaria tamen fuisse ea omnia quæ præstitimus, præstare saltem conati sumus, vel ex eo intelligi potest, quod stylus Auctoris brevissimus per se satis negotii facessat Lectoribus, et adtentos quam maxime postulet: ut minimus error sive in rebus ipsis, sive in verbis, difficultates inextricabiles nonnumquam parere queat.

Habes heic etiam, LECTOR, V. C. JOANNIS FRIDERICI GRO-  
NOVII Notas, quæ, ex quo lucem primum viderunt, Editionibus omnibus sequentibus comites datæ sunt, et, propter famam viri, sequuturis adhuc, ut conjicere licet, porro dabuntur. In illis expendendis, et emendandis aut notandis erroribus, quibus scatent, amplissimus se nobis obtulisset campus, sed et ingratiissimus labor subeundus fuisset: id vero nec tempus, nec animus sinebat Absit ut meritis Viri Celeberrimi quidquam detrahamus. Sua manet et manebit illi laus in perpetuum, eruditionis profundæ, lectionis diffusæ, et acuminis miri in rebus Grammaticis et Criticis, quæ in scriptis ejus, cedro dignis, ubique micant. Sed, si verum dicere volumus, huic nostræ disciplinæ Juris Naturalis et Gentium, ne de aliis dicam, non eam operam dederat, ut in Auctore nostro interpretando talem se præstare posset, qualem, exempli gratia, in LIVIO recensendo et explicando omnes mirantur. Perpauca heic sunt bonæ frugis: plurima supervacua, et quæ vel aliis tantum verbis sensum Auctoris satis clarum exhibent, vel usui esse possunt solis tyronibus in Lingua Latina, quales certe esse non debent, qui hoc Opus legere adgrediuntur. Sed et a mente Auctoris nostri, cujus principia non satis intelligebat, Vir Doctissimus haud raro aberrat. Et ne putes nos id gratis adserere, specimina quædam Tibi dedimus, dum obiter Notas illius, inter recensendum Opus istud, perlustraremus. Vide, exempli gratia, Lib. I. cap. II. § 10. num. 11. not. 77, et cap. III. § 8.

num. 6. not. 84. Lib. II. cap. i. § 3. not. 34. et cap. III. § 4. not. 12. cap. IX. § 11. not. 67. cap. XI. § 7. not. 60. cap. XII. § 18. not. 89, &c. Immo in iis, quæ occurrunt ad Antiquitates et Artem Criticam spectantia, aliquando videtur plane alius, ac ubi in veteribus Græcis aut Latinis exponendis versabatur: ut Lib. I. cap. III. § 15. not. 65; Lib. II. cap. XXII. § 1. not. 7, et § 5. not. 16; Lib. III. cap. XX. § 7. not. 21, et alibi. Talia, ut jam dixi, aliud agendo tantum notavimus: ne quis putet, nos probare ea, de quibus siluimus. Tantum abest enim, ut de omnibus Notis Viri Eruditissimi excutiendis cogitaverimus, ut contra in oculos incurrentes falsas explicationes aliquando data opera indicare noluerimus, quod verba Auctoris satis clara nobis viderentur, ut nemini adtendenti fraudi esse posset error Interpretis. Neque etiam id negotii nobis datum putavimus, ut loca Veterum ab illo laudata in ipsis fontibus quæreremus, satis superque habentes, si errores in numeris sponte sese offerentes tolleremus, ut et menda sive typographica, sive orta e vitioso codice, unde Notæ Viri Doctissimi primum editæ sunt; neque enim ad manum fuit prima illa Editio. Vel sic tamen longe emendatiores nunc prodeunt, ut ex collatione præcedentium Editionum cum hac nostra cuivis manifestum erit.

Superest ut doceamus, quomodo Lector dignoscere queat ea, quæ nostræ industriæ debentur, ubi scilicet id egimus ut distinguere possent, nulla comparatione cum aliis Editionibus instituta. Nam, ut ex jam dictis intelligitur, plurima sunt loca, vel ex veteribus Editionibus, vel sine illarum ope, ex certissimis rationibus tacite emendata: tum errores in designatione Librorum, Capitum, Versuum, &c. fere semper expunximus, nulla mentione facta, nullo indicio dato correctionis; quod molem voluminis inutiliter auxisset, et speciem paginarum deformem aliquatenus reddidisset. Qua de causa etiam in margine, ubi addidimus titulum, numerum Libri, Capituli, Versus, Paginæ, nullam distinctionis notam ullibi adposuimus. Sed in ipso contextu, aut in Notis, tales additiones signavimus duobus uncis, sæpius hoc modo ( ), rarius isto [ ]<sup>1</sup>. *Notulæ* autem nostræ vel separatæ omnino sunt, et tunc a Grotianis vel Gronovianis distinguuntur literis duplicibus ab initio positis, hac ratione (aa)<sup>2</sup>: primis autem nominis nostri in fine sic

<sup>1</sup> Additions peculiar to the present edition are distinguished by double brackets, thus [ ].

<sup>2</sup> In the present edition Barbeyrac's Notes are marked by the Arabic numerals from 1 to 9: the Notes of Grotius being marked by the single letters of the Alphabet, as in the earlier editions.

subjectis *J. B.* Vel Grotianis aut Gronovianis permiscentur, et tunc plerumque illis subjiciuntur, duobus uncis formæ posterioris inclusæ, et nominis nostri primis litteris in fine additis: aliquando autom ubi nimirum res ferebat, et illæ brevissimæ erant, intra ipsam Notam Auctoris aut Interpretis, eodem adposito signo, collocantur; nisi quod heic haud raro nomen nostrum non adparet, sive quod res tanti non erat, seu quod omissum fuerit a Typographis, qui etiam uncas, vel alterutrum, alibi nonnumquam omiserunt, ubi tamen facile hoc a Lectore poterit animadverti.

Est et aliud, quo hanc nostram Editionem ornare, et faciliorem ac utiliore reddere lectionem Operis, ut magna rerum varietate et copia referti, ita stylo brevissimo conscripti, plurimum voluissem, lubens etiam hunc in me laborem suscepturus: ut scilicet numeros, in quos singuli paragraphi distincti sunt, haud raro mutarem. Subdivisio illa non est a manu Auctoris, neque primarum post mortem ejus Editionum, et nescio a quo facta fuerit. Sed, quisquis ille sit, negligenter admodum in eo negotio se gessit, et aut parum intellexit seriem ac discrimen rerum et argumentorum, aut ad ea parum adtendit. Sæpissime ea distingui numeris videas, quæ manifesto conjungi debent; et vicissim in unum numerum conjuncta, quæ distinguenda omnino erant. Hoc certe non potest non morari Lectorem nondum brevitati Auctoris nostri adsuetum: cui ex sola rectiori distinctione singulorum capitum statim lux orta fuisset. Sed tamen, quum jam subdivisio illa, ut ut perperam concinnata, usu recepta quasi fuerit, et eam omnes in laudando Auctore nostro passim sequantur: dandum id mori putavi, ut ne illam immutarem. At vero in Versione mea Gallica, ubi plus juris, hac in parte et aliis, mihi sumere potui, singula quæque, prout res ipsa et Lectorum commoda mihi postulare visa sunt, ubique separabuntur.

Nil aliud est, quod in limine heic Te moneam, LECTOR BE-NEVOLE, nisi ut ante omnia perlegere velis, et suis locis aptare, EMENDANDA et ADDENDA, quæ subjeci. Neque ideo putes, negligenter curatam esse hanc Editionem, nec talem esse, qualem titulus profitetur. Vix fieri potest, ut, in Opere præsertim tam longo, numquam remittatur diligentia aut Editoris, aut Typographorum, aut eorum qui speciminibus emendandis præsumunt. Quodcunque peccatum tantilli momenti mihi visum est, dum folia transmissa perlustro, in commodum tuum notare non piguit: et, si quæ supersint errata, a me non animadversa, ea facile a Te deprehensum iri confido. Quæ qualiacumque sint, hoc possum

Tibi liquido adserere, nullam Editionem Grotiani Operis ita emendatam et utentium utilitati adcommodatam haecenus prodiisse Vale. Scribebam *Groningæ*, ipsis Kalendis Novembr. Anni *Æræ Christianæ vulgaris M. DCC. XIX.*

---

ITA præfabar ante annos quindecim, et quod excurrit. Quum autem de Opere recudendo cogitare necessum esset, omnia iterum recensui, et non pauca heic illic Notulis meis ut fert earum modus, addidi. Plurima loca Auctorum laudatorum, ex iis quæ nondum repereram, aut, deficientibus tunc Libris unde petita erant, quærere non licuerat, inventa postea signavi, ut jam in ipsis fontibus ea quoque inspiciendi cuivis sit facultas data: aliquando etiam indicavi, unde haberet Noster, quæ non suis auctoribus adscripserat et quænam causa erroris ei fuerit. Ad summam, in omnibus eandem rationem, ac antea, tenui, ut, quantum fieri posset, ornatior adhuc nova prodiret Editio. Vellem ut omnibus mendis typographicis vacua hæc esset: sed quum id vix sperari queat in ullo Libro typis describendo, nedum tali, quale est Opus istud Grotianum: quæcumque errata, aut omnia animadverti, quæ tantilli momenti essent, notavi; ut, postquam ex indice quis ea correxerit, nihil, puto, superfuturum sit, quod eum moretur. Ceterum e Versione mea et Notis Gallice scriptis, ad quas, nondum editas, in priori recensione, remittebam, plenior eorum explicatio, quæ in Notulis meis dixi, et multa alia, quæ heic dici non erat mei consilii, peti jam possunt. Scribebam *Groningæ*, Nonis *Februarii*, Ann. M. DCC. XXXV.

---





IN TRES LIBROS  
DE JURE BELLI AC PACIS  
PROLEGOMENA.

---

I. **JUS** civile, sive Romanum, sive quod cuique patrium est, <sup>I.</sup> *Jus Gentium.* aut illustrare commentariis, aut contractum ob oculos ponere aggressi sunt multi; at jus illud quod inter populos plures aut populorum rectores intercedit, sive ab ipsa natura profectum, aut divinis constitutum legibus, sive moribus et pacto tacito introductum, attigerunt pauci, universim ac certo ordine tractavit hactenus nemo: cum tamen id fieri intersit humani generis.

2 Vere enim Cicero præstabilem hanc dixit scientiam, <sup>1</sup>in federibus, pactionibus, conditionibus populorum, regum, exterarumque nationum, in omni denique belli jure et pacis. Et *Belli et pacis.*

<sup>1</sup> Non dicit CICERO, *præstabilem hanc esse scientiam*, sed Cn. Pompeii, quem laudat, *præstabilem esse scientiam*, ut in omni genere ac varietate artium, ita quoque, et quidem præcipue, in *federibus etc. in omni denique Belli Jure ac Pacis*. Adeo ut eadem non sit sententia, et non nisi per consequentiam inde deduci possit, quod Auctor inten-

dit. Mirum autem, id non observatum fuisse ab Eruditissimo Gronovio, qui Orationem, et caput, [*Orat. pro Balbo cap. 6*] unde locus iste petitus est, accurate indicavit: magno me onere levaturus, si quod heic, et in sequenti ac paucissimis aliis locis fecit, ubique, ut poterat, experiri voluisset. *J. B.*

---

PRELIMINARY REMARKS.

1 THE Civil Law, both that of Rome, and that of each nation in particular, has been treated of, with a view either to illustrate it or to present it in a compendious form, by many. But International Law, that which regards the mutual relations of several Peoples, or Rulers of Peoples, whether it proceed from nature, or be instituted by divine command, or introduced by custom and tacit compact, has been touched on by few, and has been by no one treated as a whole in an orderly manner. And yet that this be done, concerns the human race.

2 For rightly did Cicero call that an excellent science which includes the alliances, treaties, and covenants of peoples, kings, and

Euripides hanc scientiam rerum divinarum et humanarum cognitioni præponit: <sup>2</sup>sic enim Theonoe compellari facit:

Nam turpe id esset, cum scias hominum ac Deum  
Quod est eritque, justa te haud cognoscere.

3 Atque eo magis necessaria hæc opera, quod et nostro sæculo non desunt et olim non defuerunt qui hanc juris partem ita contemnerent quasi nihil ejus præter inane nomen existeret. In omnium ferme ore est Euphemi dictum <sup>a</sup>apud Thucydidem, regi aut civitati imperium habenti nihil injustum quod utile: cui simile illud, in summa fortuna id æquius quod validius; et rempublicam sine injuria geri non posse. Accedit, quod quæ inter populos aut reges incidunt controversiæ ferme Martem habent arbitrum. Est autem non vulgi tantum hæc opinio, bellum ab omni jure abesse longissime, sed et

*Nullum quibusdam, nisi utile.*

<sup>a</sup> Non præponit, sed conjungendam esse statuit, ut statim cuivis versionem Auctoris nostri, quæ fida est non minus quam elegans, insipienti patebit. Id autem quam maxime ab omni ævo neglectum fuisse, in nostra ad PUFENDORFIUM *De Jure Nat. et Gent.* Præfatione Gallica, fuse probavimus. *J. B.*

<sup>a</sup> *Apud Thucydidem*] Verba sunt Lib. vi. Ἄνδρι δὲ τυράννῳ ἢ πόλει ἀρχὴν ἐχούσῃ οὐδὲν ἄλογον, ὅ, τι ξυμφέρον. (Cap. 85. *Edit. Oxon.*) Idem sensus libro v. ubi Athenienses præponentes eo tempore sic Melios alloquun-

tur: ὅτι δίκαια μὲν ἐν τῷ ἀνθρωπείῳ λόγῳ ἀπὸ τῆς ἰσῆς ἀνάγκης κρίνεται. δυνατὰ δὲ οἱ δυνατοὶ πράσσουνσι, καὶ οἱ ἀσθενεῖς συγχωροῦσι· *justa humane rationi ea censei, quæ par necessitas indicit: ceterum quæ fieri possunt, ea fieri a validioribus, ab infirmioribus tolerari.* (cap. 89.) [In primo loco non agitur de comparatione *justi* cum *utili*, sed de *utili* tantum. Vide notas nostras Gall. *J. B.*]

<sup>b</sup> *A se posse exaudiri*] Apud Plutarchum Lyander machæram ostendens: ὁ ταύτης κρατῶν βέλτιστα

nations, and all the rights of war and peace. And Euripides prefers this science to the knowledge of things human and divine; for he makes Helen address Theonoe thus:

'twould be a base reproach  
That you, who know th' affairs of gods and men  
Present and future, know not what is just.

3 And such a work is the more necessary on this account; that there are not wanting persons in our own time, and there have been also in former times persons, who have despised what has been done in this province of jurisprudence, so far as to hold that no such thing existed, except as a mere name. Every one can quote the saying of Euphemi in Thucydides;—that for a king or a city which has an empire to maintain, nothing is unjust which is useful: and to the same effect is the saying, that for those who have supreme power, the equity is where the strength is: and that other, that state affairs cannot be carried on without doing some wrong. To this we must

viris doctis ac prudentibus sæpe dicta excidunt, quæ talem opinionem foveant. Nihil enim frequentius, quam opposita inter se, jus et arma. Nam et Ennius dixit:

Non ex jure manu consertum, sed mago ferro  
Rem repetunt.

Et Horatius ferociam Achillis sic describit:

Jura negat sibi nata, nihil non arrogat armis:

et alius alium, cum bellum ordiretur, sic loquentem inducit:

Hic pacem temerataque jura relinquo.

Antigonus senex irrisit hominem, qui sibi urbes alienas oppugnantium commentarium de justitia adferebat. Et Marius negabat præ armorum strepitu leges<sup>a</sup> se posse exaudiri. Ipse ille oris tam verecundi Pompeius ausus est dicere: <sup>c</sup> *Armatus*<sup>3</sup> *leges ut cogitem?*

Art. Po  
v. 122.

[[Lucan  
Phars. l.  
225]]

[[Plutar  
de fortit  
Alexand  
p. 330.]]  
[[Idem  
Apophth.  
262. Val  
Maxim.  
ii. 8.]]

περὶ γῆς ὄρων διαλέγεται. *Hanc qui habet, is optime de terrarum finibus disputat. Apophthegm. (p. 190 E.)* Apud eundem Cæsar: *οὐ τὸν αὐτὸν ὄπλων καὶ νόμων καιρὸν εἶναι. Non idem esse tempus armorum quod legum. (Vit. Cæs. p. 725 B.)* Seneca quarto *de Beneficiis* capite xxxvii. *Multa interim reges, in bello præsertim, operis oculis donant: non sufficit homo justus unus tot armatis cupiditatibus: non potest quisquam eodem tempore et bonum virum et bonum ducem agere.*

<sup>c</sup> *Armatus leges ut cogitem?*] Plu-

tarchus hanc sententiam Pompeii ad Mamertinos sic enuntiat: *οὐ παύσεσθε ἡμῖν ὑπεζωσμένοις εἰς φη νόμους ἀναγινώσκοντες; Non desinetis nobis hominibus gladiis accinctis leges recitare?* (Vit. Pomp. p. 623 D.) Curtius Lib. ix: *Adeo etiam naturæ jura bellum in contrarium vertit. (Cap. 4.)*

<sup>a</sup> Verba ita concepta, quæ postea, ut refert Plutarchus, Auctor in Nota sua posuit, habuerat ille ex ALBERICO GENTILI, *De Armis Romanis*, Lib. i. c. 10. pag. 62. Ed. Hanov. 1612. J. B.

add that the controversies which arise between peoples and kings have commonly war for their arbiter. And that war is far from having anything to do with rights, is not only the opinion of the vulgar, but even learned and prudent men often let fall expressions which favour such an opinion. It is very usual to put *rights* and *arms* in opposition to each other. And accordingly Ennius says:

They have recourse to arms, and not to rights.

And Horace describes Achilles thus:

Rights he spurns

As things not made for him, claims all by arms.

And another poet introduces a warrior, who when he enters on war, says:

Now, Peace and Law, I bid you both farewell.

Antigonus laughed at a man, who, when he was besieging his enemies' cities, brought to him a Dissertation on Justice. And Marius said that the din of arms prevented his hearing the laws. Even Pompey,

4 In Christianis scriptoribus plurima ejus sensus occurrunt: pro multis unum <sup>4</sup>Tertulliani sufficiat: *dolus, asperitas, injustitia, propria negotia praeliorum*. Qui ita sentiunt, dubium non est, quin opposituri sint nobis illud ex comœdia:

[Terent. Eunuch. i. 1.]

Incerta hæc si tu postules  
Ratione certa facere, nihilo plus agas,  
Quam si des operam, ut cum ratione insanias.

*Jus esse asseritum, contra Carneadis objectiones.*

5 Cum vero frustra de jure suscipiatur disputatio, si ipsum jus nullum, et ad commendandum, et ad præmuniendum opus nostrum pertinebit, hunc gravissimum errorem breviter refelli. Ceterum ne cum turba nobis res sit, demus ei advocatum. Et quem potius quam Carneadem, qui ad id pervenerat, quod academici suæ summum erat, ut pro falso non minus quam pro vero vires eloquentiæ posset intendere? Is ergo cum suscepisset justitiæ, hujus præcipue de qua nunc agimus, oppugnationem, nullum invenit argumentum validius isto: jura

Apud Lectant. v. 16.

<sup>4</sup> Locus est Lib. *Adversus Judæos*, cap. 9. J. B.

<sup>d</sup> *Oikeiōsin Stoici appellabant* Chrysostomus *ad Romanos* Homilia xxxi. [Immo Homil. iv. in cap. 1. vers. 31.] *ἐχομεν γὰρ φυσικὴν τινα πρὸς*

*ἀλλήλους οικειώσω, ἣν καὶ θηρία πρὸς ἀλλήλα κέκτηνται. Habemus natura homines cum hominibus societatem: quidni, cum tale quid inter se et fera habeant? Vide eundem capite primo ad Ephesios, ubi a natura nobis data do-*

who was so modest that he blushed when he had to speak in public, had the face to say, *Am I who am in arms to think of the laws?*

4 In Christian writers many passages of a like sense occur: let that one of Tertullian suffice for all: *Deceit, cruelty, injustice, are the proper business of battles*. They who hold this opinion will undoubtedly meet our purpose, [of establishing the Rights of War,] with the expressions in Terence:

You that attempt to fix by certain Rules  
Things so uncertain, may with like success  
Contrive a way of going mad by reason.

5 But since our discussion of Rights is worthless if there are no Rights, it will serve both to recommend our work, and to protect it from objections, if we refute briefly this very grave error. And that we may not have to deal with a mob of opponents, let us appoint them an advocate to speak for them. And who can we select for this office, fitter than Carneades, who had made such wonderful progress in his suspension of opinion, the supreme aim of his Academical Philosophy, that he could work the machinery of his eloquence for falsehood as easily as for truth. He, then, undertook to argue against justice; and especially the kind of justice of which we here treat; and in doing so, he found no argument stronger than this:—

sibi homines pro utilitate sanxisse, varia pro moribus, et apud eosdem pro temporibus sæpe mutata: jus autem naturale esse nullum: omnes enim et homines et alias animantes ad utilitates suas natura ducente ferri: proinde aut nullam esse justitiam, aut si sit aliqua, summam esse stultitiam, quoniam sibi noceat alienis commodis consulens.

6 Verum quod hic dicit philosophus, et sequitur ποῖτα: [[ Horat. I. Sat. III. 113. ]]  
1. Naturale.

Nec natura potest justo socernere iniquum:

admitti omnino non debet: nam homo animans quidem est, sed eximium animans, multoque longius distans a ceteris omnibus, quam ceterorum genera inter se distant: cui rei testimonium perhibent multæ actiones humani generis propriæ. Inter hæc autem, quæ homini sunt propria, est appetitus societatis, id est communitatis non qualiscunque sed tranquillæ, et pro sui intellectus modo ordinatæ, cum his qui sui sunt generis: quam <sup>α</sup>οικείωσιν Stoici <sup>β</sup>appellabant. Quod ergo dicitur natura

cet ad virtutem semina. Marcus Antoninus Imperator summe philosophus: *ὄτι γὰρ πρὸς κοινωνίαν γεγόναμεν, παλαι δὲδεικται ἢ οὐκ ἦν ἐναργῆς, ὅτι τὰ χεῖρω τῶν κρείττωνων ἕνεκεν, τὰ δὲ κρείττω τῶν ἀλλήλων. Pridem patuit*

*ad societatem nos genitos. Nonne in aperto est deteriora esse meliorum causa, meliora vero alterum alterius causa? Lib. v. § 16. Edit. Gatak.*

<sup>β</sup> Auctor, in Nota sua, testem tantum adfert Chrysostomum vocis οικεί-

that men had, as utility prompted, established Rights, different as their manners differed; and even in the same society, often changed with the change of times: but Natural Law there is none: for all creatures, men and animals alike, are impelled by nature to seek their own gratification: and thus, either there is no such thing as justice, or if it exist, it is the height of folly, since it does harm to itself in aiming at the good of others.

6 But what the philosopher here says, and what the poet (Horace) follows:—

By naked nature ne'er was understood  
 What's just and right:

must by no means be admitted. For man is an animal indeed, but an animal of an excellent kind, differing much more from all other tribes of animals than they differ from one another; which appears by the evidence of many actions peculiar to the human species. And among these properties which are peculiar to man, is a desire for society; that is, a desire for a life spent in common with fellow-men; and not merely spent somehow, but spent tranquilly, and in a manner corresponding to the character of his intellect. This desire the Stoics called *οικείωσις*, the domestic instinct, or feeling of kindred.

*Homini proprium sociale: proprie et stricto dictum.*

8 Hæc vero, quam rudi modo jam expressimus, <sup>6</sup>societatis custodia, <sup>7</sup>humano intellectui conveniens, fons est ejus juris, quod proprie tali nomine appellatur: <sup>h</sup>quo pertinent alieni abstinentia, et si quid alieni habeamus aut lucri inde fecerimus restitutio, promissorum implendorum obligatio, damni culpa dati reparatio, et pœnæ inter homines meritum.

9 Ab hac juris significatione fluxit altera largior: quia enim homo supra ceteras animantes non tantum vim obtinet socialem, de qua diximus, sed et judicium ad æstimanda quæ delectant aut nocent, <sup>8</sup>non præsentia tantum, sed et futura, et quæ in utrumvis possunt ducere; pro humani intellectus modo

*s Societatis custodia humano intellectui conveniens] Seneca iv. de Beneficiis, cap. xviii. Ut scias per se expetendam esse grati animi affectionem, per se fugienda res est, ingratum esse, quoniam nihil æque concordiam humani generis dissociat ac distrahit, quam hoc vitium. Nam quo alio tuti sumus, quam quod mutuis juvamus officiis? hoc uno instructor vita, contraque incursiones subitas munitior est, beneficiorum commercio. Fac nos singulos, quid sumus? præda animalium et victimæ ac vilissimus et facillimus sanguis: quoniam ceteris animalibus in tutelam sui satis virium est. Quæcumque vaga nascuntur, et actura vitam segregem, armata sunt: hominem imbecillitas cingit: non unguium vis, non dentium, terribilem ce-*

*teris facit: duas res dedit, quæ illum, obnoxium ceteris, validissimum facerent, rationem et societatem: itaque qui par esse nulli posset si diduceretur, rerum potitur. Societas illi dominium omnium animalium dedit: Societas terris genitum in alienæ naturæ transmisit imperium, et dominari etiam in mari jussit. Hæc morborum impetus arcuit, senectuti adminicula prospexit, solatia contra dolores dedit: hæc fortes nos facit, quod licet contra fortunam advocare. Hanc tolle, et unitatem generis humani, qua vita sustinetur, scindes. Tollitur autem, si efficies ut ingratus animus non per se vitandus sit.*

<sup>7</sup> Vide PUFENDORPIUM nostrum *De Jure Nat. et Gent. Lib. II. cap. 3.* ubi fuse principium istud adstruit et ex-

8 And this tendency to the conservation of society, which we have now expressed in a rude manner, and which tendency is in agreement with the nature of the human intellect, is the source of *Jus*, or Natural Law, properly so called. To this *Jus* belong the rule of abstaining from that which belongs to other persons; and if we have in our possession anything of another's, the restitution of it, or of any gain which we have made from it; the fulfilling of promises, and the reparation of damage done by fault; and the recognition of certain things as meriting punishment among men.

9 From this signification has flowed another larger sense of *Jus*: for, inasmuch as man is superior to other animals, not only in the social impulse of which we have spoken, but in his judgment and power of estimating advantages and disadvantages; and in these, not only present good and ill, but also future good and ill, and what may lead to each; we may understand that it is congruous to human

etiam in his iudicium recte conformatum sequi, neque metu, aut voluptatis præsentis illecebra corrumpi, aut temerario rapi impetu, conveniens esse humanæ naturæ; et quod tali iudicio plane repugnat, etiam contra jus naturæ, humanæ scilicet, esse intelligitur.

10 Atque huc etiam pertinet in his quæ cuique homini aut cœtui propria sunt elargiendis <sup>Improprie et laxius.</sup> prudens dispensatio, ut quæ nunc sapientiore minus sapienti, nunc propinquum extraneo, nunc pauperem diviti, prout actus cujusque et rei natura fert, præponit: quam juris proprie stricteque dicti partem jam olim multi faciunt, cum tamen jus illud proprie

ponitur. *J. B.*

<sup>b</sup> *Quo pertinent alieni abstinentia]* Porphyrius de non esu animantium tertio: ἡ δὲ δικαιοσύνη ἐν τῷ ἀφεκτικῷ καὶ ἀβλαβεί κείται παντὸς ὄνουσιν τοῦ μὴ βλάπτουτος. *Justitia in eo sita est, ut abstinence alienis, neque nocetur non nocentibus.* (Pag. 329.)

<sup>a</sup> Ita quidem habent omnes Editiones: sed, quamquam sensus Auctoris ex serie orationis satis pateat, loquutio non satis est adcurata. Neque enim τὸ nocent recte opponitur τῷ delectant: nisi dicas, quidquid delectat, id prodesse; quod a mente Auctoris et rei veritate plane alienum est. Aut heic est ἀκυρολογία, aut possit quis suspicari Auctorem voluisse scribere: QUÆ

*delectant* AUT DOLOREM CREANT, QUÆ JUVANT aut nocent: voces autem intermedias, sive ex ipsius Auctoris lapsu calami, sive ex incogitantia Exscriptorum, excidisse, adeo ut neque postea Auctor, rebus magis quam verbis intentus, id animadvertit, quemadmodum alibi non semel accidisse nobis comperitum est. Ceterum res ipsa pertinet ad officia Hominis erga se ipsum, de quibus fuse PUFENDORFIUS, *De Jur. Nat. et Gent.* Lib. II. c. 4. *J. B.*

<sup>1</sup> *Prudens dispensatio, ut quæ nunc sapientiore minus sapienti, nunc propinquum extraneo, nunc pauperem diviti, prout actus cujusque et rei natura fert, præponit]* Agit hac de re Ambrosius libro primo *de Officiis.* (Cap. 30.)

nature to follow, in such matters also, [the estimate of future good and ill, and of the consequences of actions,] a judgment rightly framed; not to be misled by fear or by the temptation of present pleasure, nor to be carried away by blind and thoughtless impulse; and that what is plainly repugnant to such judgment, is also contrary to *Jus*, that is, to Natural Human Law.

10 And to this exercise of judgment pertains a reasonable and thoughtful assignment, to each individual and each body of men, of the things which peculiarly belong to them; by which exercise of judgment in some cases, the wiser man is preferred to the less wise; in others, our neighbour to a stranger; in others, a poor man to a rich man; according as the nature of each act and each thing requires. And this some persons have treated as a part of *Jus* properly and strictly so called; although *Jus* properly so called is really very different in its nature, and has this for its special office; to leave to another what is his, to give to him what we owe.

nominatum diversam longe naturam habeat, in eo positam, ut quæ jam sunt alterius alteri permittantur, aut <sup>9</sup>impleantur.

11 Et hæc quidem quæ jam diximus, locum aliquem haberent, etiamsi daremus, <sup>1</sup>quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana: cujus contrarium cum nobis partim ratio, partim traditio perpetua inseverint; confirmet vero et argumenta multa et miracula ab omnibus sæculis testata, sequitur, jam ipsi Deo, ut opifici et cui nos nostraque omnia debeamus, sine exceptione parendum nobis esse, præcipue cum is se multis modis et optimum et potentissimum ostenderit; ita ut sibi obedientibus præmia reddere maxima, etiam æterna, quippe æternus ipse, possit, et voluisse credi debeat, multoque magis si id disertis verbis promiserit: quod Christiani indubitata testimoniorum fide convicti credimus.

<sup>9</sup> Nihil heic volui mutare: sed, quamquam ita in omnibus Editionibus legatur, vix dubito quin Auctor scripserit: aut QUÆ ALTERI DEBENTUR impleantur: neque enim, secundum Auctorem nostrum, ea quæ implentur, jam erant alterius, erga quem implentur, sed tantum ei debebantur, tum demum illius futura, quando impleta fuerint. Vide infra Lib. II. c. 7. num. 1. et Lib. III. c. 19. n. 15. J. B.

<sup>1</sup> Vide, quæ observavimus in PUFENDORFII nostrum, *De Jur. Nat. et*

*Gent. Lib. II. c. 3. § 19. not. 2. et quæ infra monemus, ad Lib. I. c. 1. § 8, [immo 10] num. 2. not. 4. J. B.*

<sup>k</sup> *Ex libera Dei voluntate*] Inde M. Antonino judice libro IX: ὁ ἀδικῶν ἀρεστῆι· qui injuste agit, impius est. [Locus est § 1. Sed ibi agitur de jure Naturali, non de *Jure Divino voluntario*, qui ex libera Dei voluntate venit. Plura diximus in Gallicis Notis. J. B.]

<sup>l</sup> *Deo tamen adscribi merito potest*] Chrysostomus I. ad Corinthios xi. 3: ἔσαν δὲ εἰπῶ τῆν φύσιν, θεὸν λέγω. ὁ

11 And what we have said would still have great weight, even if we were to grant, what we cannot grant without wickedness, that there is no God, or that he bestows no regard on human affairs. But inasmuch as we are assured of the contrary of this, partly by reason, partly by constant tradition, confirmed by many arguments and by miracles attested by all ages, it follows that God, as the author of our being, to whom we owe ourselves and all that we have, is to be obeyed by us without exception, especially since he has, in many ways, shewn himself both supremely good and supremely powerful: wherefore he is able to bestow upon those who obey him the highest rewards, even eternal ones, as being himself eternal; and he must be supposed to be willing as well as able to do this; and the more so, if he have promised such rewards in plain language; which we Christians believe, resting our belief on the indubitable faith of testimonies.

12 And here we are brought to another origin of Jus, besides



12 Et hæc jam alia juris origo est præter illam naturalem, veniens scilicet <sup>2</sup>ex libera Dei voluntate, cui nos subjici debere intellectus ipse noster nobis irrefragabiliter dictat. Sed et illud ipsum de quo egimus naturale jus, sive illud sociale, sive quod laxius ita dicitur, quamquam ex principiis homini internis profuit, <sup>1</sup>Deo tamen adscribi merito potest, quia ut talia principia in nobis existerent ipse voluit: quo sensu Chrysippus et Stoici dicebant, juris originem non aliunde petendam quam ab ipso Jove, <sup>m</sup>a quo Jovis nomine jus Latinis dictum probabiliter dici potest.

13 Accedit, quod illa quoque ipsa principia Deus datis legibus magis conspicua fecit, etiam iis quibus imbecillior est ad ratiocinandum vis animi: et in diversa trahentes impetus, qui nobis ipsis, quique aliis male <sup>2</sup>consulunt, vagari vetuit,

γὰρ τὸν φύσιν δημιουργήσας αὐτὸς ἐστίν. Cum naturam dico, Deum dico; ipse enim est natura opifex. [Tom. III. pag. 410. Edit. Eton. Savil.] Chrysippus III. de Diis: οὐ γὰρ ἐστὶν εὐρεῖν τῆς δικαιοσύνης ἄλλην ἀρχὴν οὐδὲ ἄλλην γένεσιν, ἢ τὴν ἐκ τοῦ Διὸς καὶ τὴν ἐκ τῆς κοινῆς φύσεως. ἐντεῦθεν γὰρ δεῖ πᾶν τὸ τοιοῦτον τὴν ἀρχὴν ἔχειν, εἰ μέλλομέν τι εἶρεῖν περὶ ἀγαθῶν καὶ κακῶν. Non potest inveniri principium aliud aut origo justitiæ, quam ab Jove et communi natura: inde enim initium duci debet, ubi de bonis

malisque disserendum est. [Apud PLUTARCH. de Stoic. rep. pag. 1035.]

<sup>m</sup> A quo Jovis nomine jus latinis dictum] Nisi forte verius per abscissionem, ut ex eo quod fuit *ossum* factum est *os*, ita ex eo quod fuerat *jussum* factum *jus, jusis*, postea *juris*, ut ex *Papisis Papirii*, de quo vide Cicero-nem Lib. IX. epist. 21.

<sup>2</sup> Vocem illam *male*, quæ excidit in omnibus Editionibus, fidenter addidi. Illam deesse, adeo ut aliter Auctoris sententia non constet, res ipsa clamat. Si enim τὸ *consulunt* in bonam partem

that natural source; namely, the free will of God, to which, as our reason irresistibly tells us, we are bound to submit ourselves. But even that Natural Law of which we have spoken, whether it be that which binds together communities, or that looser kind [which enjoins duties,] although it do proceed from the internal principles of man, may yet be rightly ascribed to God; because it was by His will that such principles came to exist in us. And in this sense, Chrysippus and the Stoics said that the origin of *Jus* or Natural Law was not to be sought in any other quarter than in Jove himself; and it may be probably conjectured that the Latins took the word *Jus* from the name *Jove*.

13 To this we must add, that these principles God has made more manifest by the laws which he has given, so that they may be understood by those whose minds have a feebler power of drawing inferences: and he has prohibited the perverse aberrations of our affections which draw us this way and that, contrary to our own interest

illos quippe vehementiores adductius regens et fine ac modo coercens.

14 Sed et historia sacra præter id, quod in præceptis consistit, affectum illum socialem non parum etiam eo excitat, quod nos docet ab iisdem primis parentibus ortos homines omnes, ita ut eo quoque sensu dici recte possit quod alio dixit Florentinus, cognationem inter nos a natura constitutam; cui consequens sit, hominem homini insidiari nefas esse. Inter homines quasi <sup>a</sup>Dii quidam sunt parentes, quibus proinde non infinitum sed sui generis obsequium debetur.

L. ut vim.  
3. D. de Just.  
et Jur.

2. Humanum.

15 Deinde vero, cum juris naturæ sit stare pactis, (necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest,) ab hoc ipso fonte jura civilia fluxerunt. Nam qui se cœtui alicui aggregaverant, aut homini hominibusque subjecerant, hi aut expresse

Civile cujus-  
que civilitate.

sumas, ut omnino sumendum, quando nihil aliud additur (vide exemplum infra, Lib. III. c. 20. § 51.) tunc utiles esse, et nobis, et aliis, impetus illos in alia trahentes, quam quo ducit Ratio et Lex Naturæ, Auctor noster dicet; quod quam alienum sit a mente ipsius, nemo non intelligit. Vix autem dubito, quin propter similitudinem vocis *aliis* cum

sequenti *male*, hæc omissa fuerit vel ab exscriptore, vel a typographo: et ejus rei exempla alibi videbimus. J. B.

<sup>a</sup> *Dii quidam sunt parentes*] Θεοὶ ἐπίγειοι Hierocli ad aureum carmen, *Dii terrestres*: Philoni ad *Decalogum* ἐμφανεῖς Θεοὶ, μιμούμενοι τὸν ἀγέννητον ἐν τῷ ζῴοπλαστῆιν. *conspicui Dii, qui ingentium Deum imitantur vi-*

and the good of others; putting a bridle upon our more vehement passions, controlling and restraining them within due limits.

14 Further. The Sacred History, besides that part which consists in precepts, offers another view which in no small degree excites the social affection of which we have spoken; in that it teaches us that all men are sprung from the same parents. And thus we may rightly say, in this sense also, what Florentinus says in another sense, that there is a kindred established among us by nature: and in virtue of this relation it is wrong for man to intend mischief towards man.

Among men [all are not on the same footing towards us: as for instance,] our parents are a sort of Gods to us, to whom obedience is due; not infinite indeed, but an obedience of its own proper kind.

15 In the next place, since it is conformable to Natural Law to observe compacts, (for some mode of obliging themselves was necessary among men, and no other natural mode could be imagined,) Civil Rights were derived from this source, mutual compact. For those who had joined any community, or put themselves in subjection

promiserant, aut ex negotii natura tacite promississe debebant intelligi, secuturos se id quod aut cœtus pars major, aut hi, quibus delata potestas erat, constituissent.

16 Quod ergo dicitur non Carneadi tantum, sed et aliis,

°Utilitas justi prope mater et æqui,

si accurate loquamur, verum non est: nam naturalis juris mater est ipsa humana naturá, quæ nos, etiamsi re nulla indigeremus, ad societatem mutuam appetendam ferret: civilis vero juris mater est ipsa ex consensu obligatio, quæ cum ex naturali jure vim suam habeat, potest natura hujus quoque juris quasi proavia dici. Sed naturali juri utilitas accedit: voluit enim naturæ Auctor nos singulos et infirmos esse, et multarum rerum ad vitam recte ducendam egentes, quo magis ad colendam societatem raperemur: juri autem civili occasio-

*tam dando.* (Pag. 761 v.) secunda post Deumfœderatio Hieronymo epist. XLVII. (Tom. I. pag. 224 v. *Edit. Basil.*) Parentes Deorum simulacra Platoni de legibus XI. (Pag. 930, 931. Tom. II. *Ed. H. Steph.*) Honos parentibus ut Diis debetur, pronuntiante Aristotele *Nicomacheorum* IX. cap. 11. [Locus HIEROCLES non est e Comment. in *Aurea Carm.* sed reperitur apud STOB.

Serm. 77. J. B.]

° *Utilitas justi prope mater et æqui*] Ad quem locum *Acron*, aut quisquis est vetus Horatii interpres: *repugnat præceptis Stoicorum: ostendere vult justitiam non esse naturalem, sed natam ex utilitate.* Contra hanc sententiam vide quæ disputat Augustinus de *Doctrina Christiana* Libro III. c. XIV.

to any man or men, those either expressly promised, or from the nature of the case must have been understood to promise tacitly, that they would conform to that which either the majority of the community, or those to whom the power was assigned, should determine.

16 And therefore what Carneades said (as above), and what others also have said, as Horace,

Utility, Mother of just and right.

if we are to speak accurately, is not true. For the Mother of Right, that is, of Natural Law, is Human Nature; for this would lead us to desire mutual society, even if it were not required for the supply of other wants; and the Mother of Civil Laws, is Obligation by mutual compact; and since mutual compact derives its force from Natural Law, Nature may be said to be the Grandmother of Civil Laws. [The genealogy is, Human Nature: Natural Law: Civil Laws.] But Natural Law, [which impels us to society,] is *reinforced* by Utility. For the Author of Nature ordained that we should, as individuals, be weak, and in need of many things to make life comfortable, in order that we might be the more impelled to cling to society. But

nem dedit utilitas: nam illa quam diximus consociatio, aut subjectio utilitatis alicujus causa cœpit institui. Deinde et qui jura præscribunt aliis, in eo utilitatem aliquam spectare solent, aut debent.

*Gentium: civitatum omnium aut plebatarumque.*

17 Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes, aut plerasque, ex consensu jura quædam nasci potuerunt, et nata apparet, quæ utilitatem respicerent non cœtuum singulorum sed magnæ illius universitatis. Et hoc jus est quod gentium dicitur, quoties id nomen a jure naturali distinguimus: quam partem juris omisit Carneades, jus omne in naturale et civile singulorum populorum distribuens, cum tamen de eo jure quod inter populos versatur acturus, (subjecti enim orationem de bellis et bello partis) hujus juris mentionem facere omnino debisset.

II.  
*Objectionum refutatio.*

18 Male autem a Carneade stultitiæ nomine justitia traducitur. Nam sicut, ipso fatente, stultus non est civis, qui in

ἢ Sicut civis qui jus civile perumpit] Hac ipsa similitudine apposite utitur Lib. ix. M. Antoninus: ἥτις ἐὰν οὐκ πράξῃς σου μὴ ἐχθρὴν ἀναφορὰν, εἴτε προσεχῶς εἴτε πόρρωθεν, ἐπὶ τὸ κοινωνικὸν τέλος, αὕτη διασπᾶ τὸν βίον, καὶ οὐκ ἐὰν εἶναι, καὶ στασιωδὴς ἐστίν, ὥσπερ ἐν δῆμῳ ὁ τὸ καθ'

αὐτὸν μέρος διίσταμενος. Quæcumque tua actio respectum non habebit sive cominus sive eminus ad propositum communitatis, ea vitam diducit, nec unam esse patitur, seditiosaque non minus est quam is qui in populo partem seorsim facit. (§ 24.) Et libro xi: ἀνθρώπος ἐνὸς ἀνθρώπου ἀποσχισθεὶς, οὐ δύναται

Utility is the occasion of Civil Laws; for the association or subjection by mutual compact, of which we have just spoken (15), was at the first instituted for the sake of some utility. And accordingly, they who prescribe laws for others, in doing this, aim, or ought to aim, at some Utility, to be produced to them for whom they legislate.

17 Further: as the Laws of each Community regard the Utility of that Community, so also between different Communities, all or most, Laws might be established, and it appears that Laws have been established, which enjoined the Utility, not of special communities, but of that great aggregate System of Communities. And this is what is called the Law of Nations, or International Law; when we distinguish it from Natural Law. And this part of Law is omitted by Carneades, who divides all Law into Natural Law, and the Civil Laws of special peoples; while yet, inasmuch as he was about to treat of that Law which obtains between one people and another, (for then follows an oration concerning war and acquisitions by war,) he was especially called upon to make mention of Law of this kind.

18 And it is without any good reason that Carneades maintains,

civitate jus civile sequitur, etiamsi ob ejus juris reverentiam quædam sibi utilia omittere debeat: ita nec stultus est populus, qui non tanti facit suas utilitates, ut propterea communia populorum jura negligat; par enim in utroque est ratio. Nam sicut civis qui jus civile perrumpit utilitatis præsentis causa, id convellit quo ipsius posteritatisque suæ perpetuæ utilitates continentur: sic et populus jura naturæ gentiumque violans, suæ quoque tranquillitatis in posterum rescindit munimenta. Tum vero etiamsi ex juris observatione nulla spectaretur utilitas, sapientiæ non stultitiæ esset eo ferri, ad quod a natura nostra nos duci sentimus.

*Justitia  
utilitatis  
non est.*

### 19 Quare nec illud,

Jura inventa metu injusti fateare necesse est:

quod apud Platonem quidam ita explicat, metu accipiendæ injuriæ repertas leges, ac vi quadam homines ad justitiam colendam adigi, universaliter verum est. Id enim ad ea dumtaxat instituta ac leges pertinet, quæ ad faciliorem juris

*De Rep.  
Lib. ii. p.  
359 m.  
Tom. ii.  
Gorg. p. 483.  
Tom. i.  
Vis ex metu  
injusti, et  
validioris,  
causa jus  
non est.*

μη και ἔλον φύλου ἀποκεκόφθαι. Homo ab uno abscissus homine, non potest non et ab universo genere abscissus haberi. (§ 8.) Nimirum, ut eidem Antonino dictum est, quod examini expedit, idem apl. [Locus ultimus exstat Lib. vi. § 54. In præcedenti autem, pro verbis illis, οὐ δύναται μη και ἔλον φύ-

λου ἀποκεκόφθαι, legitur: ἔλης τῆς κοινωνίας ἀποπέπτωκε. Nimirum Auctor statim antea legerat: Κλάδος τοῦ προσεχοῦς κλάδου ἀποκοπεῖ οὐ δύναται μη και τοῦ ἔλου φυτοῦ ἀποκεκόφθαι· οὕτω δὴ και ἄνθρωπος etc. Hæc igitur, memoriæ lapsu, confudit, simulque τὸ φυτοῦ in φύλου mutavit. J. B.]

as we have said (5), that justice is folly. For since, by his own confession, that Citizen is not foolish who in a Civil Community obeys the Civil Law, although, in consequence of such respect for the Law he may lose something which is useful to himself: so too that People is not foolish which does not so estimate its own utility, as, on account of that, to neglect the common Laws between People and People. The reason of the thing is the same in both cases. For as a citizen who violates the Civil Law for the sake of present utility, destroys that institution in which the perpetual utility of himself and his posterity is bound up; so too a people which violates the Laws of Nature and Nations, beats down the bulwark of its own tranquillity for future time. And even if no utility were to arise from the observation of Law, it would be a point, not of folly, but of wisdom, to which we feel ourselves drawn by nature.

19 And therefore neither is that other saying of Horace [1 Sat. iii.] universally true:

'Twas fear of wrong that made us make our laws;

an opinion which one of the interlocutors in Plato's *Republic* explains

executionem reperta sunt; sicut multi per se infirmi, ne a validioribus opprimerentur, conspirarunt ad instituenda ac communibus viribus tuenda judicia, ut quibus singuli pares non erant, his universi prævalerent. Et hoc demum sensu commode accipi potest quod dicitur jus esse id quod validiori placuit; ut intelligamus fine suo externo carere jus, nisi vires ministras habeat; sicut Solon res confecit maximas, ut ipse prædicabat:

Apud  
Plutarch. Vit.  
Solon. p. 86 c.

Ἄμοῦ βίην τε καὶ δίκην συναρμόσας.

¶ Vim jusque parilis copulans vinculi jugo.

JUSTITIA  
securitatem  
adfert con-  
scientiæ.

20 Neque tamen quamvis a vi destitutum jus omni caret effectu: nam justitia securitatem affert conscientiæ, injustitia tormenta ac laniatus, quales in tyrannorum pectoribus describit Plato. Justitiam probat, injustitiam damnat proborum consensus. Quod vero maximum est, hæc Deum inimicum, illa faventem habet, qui judicia sua ita post hanc vitam reservat, ut sæpe eorum vim etiam in hac vita repræsentet, quod multis exemplis historiæ docent.

[[Gorg. p. 524,  
p. 525, Tom.  
I.]]

¶ *Vim jusque parilis copulans vinculi jugo* Ovidius:

Valet causa, causamque tuentibus armis.

[*Metam.* Lib. viii. vers. 59. ubi tamen

melius Cl. Burmanni Editio verba hæc, *causamque tuentibus armis*, conjungit cum sequentibus: *Ut puto, vincemur.* J. B.]

in this way: that Laws were introduced from the fear of receiving wrong, and that men are driven to practise justice by a certain compulsion. For that applies to those institutions and laws only which were devised for the more easy maintenance of rights: as when many, individually feeble, fearing to be oppressed by those who were stronger, combined to establish judicial authorities, and to uphold them by their common strength; that those whom they could not resist singly, they might, united, control. And we may accept in this sense, and in no other, what is also said in Plato, that Right is that which the stronger party likes: namely, that we are to understand that Rights do not attain their external end, except they have force to back them. Thus Solon did great things, as he himself boasted,

By linking Force in the same yoke with Law.

20 But still Rights, even unsupported by force, are not destitute of all effect: for Justice, the observance of Rights, brings security to the conscience; while injustice inflicts on it tortures and wounds, such as Plato describes as assaulting the bosoms of tyrants. The conscience of honest men approves justice, condemns injustice. And what is the greatest point, injustice has for its enemy, justice, for its friend, God, who reserves his judgments for another life, yet in such a manner that he often exhibits their power in this life; of which we have many

21 Quod vero multi quam a civibus exigunt justitiam, eam in populo aut populi rectore insuper habeant, ejus erroris causa est, primum quod in jure nihil spectant nisi utilitatem quæ ex jure oritur, quæ evidens est in civibus, qui singuli ad sui tutelam invalidi sunt. At magnæ civitates, cum omnia in se complecti videantur quæ ad vitam recte tuendam sunt necessaria, opus habere non videntur ea virtute, quæ foras spectat et justitia appellatur.

*Privatis populo, et populi rectoribus æque convenit.*

[Aristoteles  
Justitiam  
dixit  
ἀλλότριον  
ἀγαθόν  
*Ethic. Nicom.*  
Lib. v. c. 10.  
J. B.]

22 Sed, ut ne repetam quod dixi, jus non solius utilitatis causa comparatum, nulla est tam valida civitas quæ non aliquando aliorum extra se ope indigere possit, vel ad commercia, vel etiam ad arcendas multarum externarum gentium junctas in se vires; unde etiam a potentissimis populis et regibus federa appeti videmus, quorum vis omnis tollitur ab his qui jus intra civitatis fines concludunt. Verissimum illud, omnia<sup>3</sup> incerta esse simul a jure recessum est.

23 Si nulla est communitas quæ sine jure conservari possit, quod memorabili latronum exemplo probabat Aristo-

<sup>3</sup> Verba sunt CICERONIS, *ad Familiar. Epist. xi. 16.* quæ etiam ab Auctore nostro ei tribuuntur in Nota sequenti. Ibi tamen, ut et in loco ex

*Orat. pro Cæcin.* quem Gronovius indicat, agitur tantum de Legibus Civilibus. J. B.

<sup>1</sup> Quod memorabili latronum exem-

examples in history.

21 The reason why many persons, while they require justice as necessary in private citizens, commit the error of thinking it superfluous in a People or the Ruler of a People, is this: in the first place, that in their regard to rights they look at nothing but the utility which arises from rights, which in the case of private citizens is evident, since they are separately too weak to protect themselves: while great States, which seem to embrace within them all that is requisite to support life in comfort, do not appear to have need of that virtue which regards extraneous parties, and is called justice.

22 But, not to repeat what I have already said, that Rights are not established for the sake of utility alone, there is no State so strong that it may not, at some time, need the aid of others external to itself: either in the way of commerce, or in order to repel the force of many foreign nations combined against it. And hence we see that Leagues of alliance are sought even by the most powerful Peoples and Kings; which can have no force according to the principles of those who confine rights within the boundary of the State alone. It is most true [as Cicero says,] that everything loses its certainty at once, if we give up the belief in rights.

23 If no society whatever can be preserved without the recognition

teles<sup>4</sup>: certe et illa quæ genus humanum aut populos complures inter se colligat, jure indiget: quod ille vidit qui<sup>5</sup> dixit, fœda ne patriæ quidem causa facienda esse. <sup>a</sup> Graviter eos accusat Aristoteles, qui cum inter se neminem velint imperare nisi qui jus habeat, in externos quid jus, quid injustum sit nihil curant.

Poët. vii. 2.

Regis Pacem.

24 Is ipse quem nominavimus modo in partem alteram Pompeius, quod Spartanus quidam rex dixerat, beatissimam esse rempublicam, cujus fines hasta et gladio terminarentur, correxit, dicens eam vere beatam esse, quæ justitiam pro fini-

plo probabat Aristoteles] Chrysostomus in caput iv. ad Ephesios: (Tom. III. pag. 813. Edit. Savil.) πῶς οὖν λησται εἰρηνεύουσι, φησ. πότε; εἰπέ μοι. πάντως ὅταν οὐ ληστικῆ τροπῆ χρησῶνται. ἂν γὰρ ἐν αὐτοῖς οἷς ἂν διανεμῶνται, μὴ τοῦ νόμου φυλάξωσι τοῦ τοῦ δικαίου, καὶ ἐκάστῳ ἀπονέμωσι τὸ δίκαιον, εὐρήσεις ἂν κἀκείνους ἐν πολέμῳ καὶ μάχαις. *At qui fit ergo, dicit aliquis, ut in pace vivant latrones? Quando vero? dic queso. Nempe cum non ut latrones agunt: nam si in dividendis rebus præscripta justitia non servent, neque partitionem ex æquo faciant, videbis et ipsos inter se bellis ac præliis implicari.* Plutarchus (Vit. Pyrrh. pag. 388 A.) cum Pyrrhi recitasset dictum, regnum se ei liberum suorum relinquere, cui acutissimus futurus esset gladius, dicit hoc nihil aliud esse quam quod in Phœnissis posuit Euripides,

(vers. 68):

Θηκτῆ σιδήρῳ δῶμα διαλαχεῖν τόδε.

Ut sanguinante dividant ferro domum.

Additque acclamationem egregiam: οὐτως ἀμικτός ἐστι καὶ θηριώδης ἡ τῆς πλεονεξίας ὑπόθεσις. *Adeo insociabile ferinumque est propositum plus suo habendi.* Cicero epist. xi. 16. *omnia sunt incerta, cum a jure discessum est.* Polybius IV: καὶ γὰρ κατ' ἰδίαν τε πάντων βραδουργῶν καὶ κλεπτικῶν φύλον τοῦτο μάλιστα τῷ τρόπῳ σφάλλεται, τῷ μὴ ποιεῖν ἀλλήλοις τὰ δίκαια, καὶ συλλήβδην διὰ τὰς εἰς αὐτοὺς ἀθεσίας. *Nam et privatae coitiones facinorosorum ac furum hoc maxime modi everti solent, ubi inter se jus non præstant, et in summa, ubi fides inter ipsos perit.* (Cap. 29.)

<sup>4</sup> Immo PLATO, ni fallor. Neque enim ullus, quod sciam, talem sententiam ex Aristotele protulit, quum tamen

of mutual rights, which Aristotle [rather Plato, J. B.] proves by the strong instance of a society of robbers; assuredly that society which includes the whole human race, or at any rate, the greater part of nations, has need of the recognition of rights: as Cicero saw when he said that some things are so bad that they are not to be done even for the sake of saving our country (*Off.* I. 45). Aristotle speaks with strong condemnation of those, who, while they will allow no one to hold rule among themselves, except him who has the right to do so, yet in their dealings with strangers have no care of rights, or the violation of rights.

24 A little while ago we quoted Pompey for his expression on the other side; yet on the other hand, when a certain Spartan king had said, Happy that republic which has for its boundaries the spear and the sword, Pompey corrected him, and said, Happy rather that which has justice for its boundary\*. And to this effect he might have

\* Barbeyrac conjectures that this anecdote of Pompey, for which he cannot



bus haberet. Quam ad rem alterius itidem Spartani regis uti potuit auctoritate, <sup>1</sup>qui militari fortitudini justitiam anteposuit, hoc argumento, quod fortitudo justitia quadam regi deberet, at si justii essent homines omnes, fortitudine illa non indigerent. Ipsam fortitudinem Stoici definiebant virtutem propugnantem pro æquitate. Themistius oratione ad Valentem facunde disserit, reges, quales exigit sapientiæ regula, non unius sibi creditæ gentis habere rationem, sed totius

[[ Agesilat. Apud Plutarchum, *Apophthegm.* p. 213 B. ]]

Apud Ciceron. *De Offic.* l. 19.

loca veterum in hanc rem congerere voluerint Interpretes in CICERON. *De Offic.* 11. 11. Locus autem Platonis luculentus ab iis indicatus est, quem reperies Lib. 1. *De Republ.* pag. 351 c. Tom. 11. *Ed. H. Steph.* Hæc in prima Editione dicebam. Reperi postea locum Aristotelis, qui ad rem facit, apud СТОΒΑΕΥΜ, *Serm.* x. pag. 131. *Ed. Geneva.* 1609. *J. B.*

<sup>5</sup> Innuit Auctor, quod CICERO dixit: *Sunt enim quædam ita facta, ut ea, ne conservandæ quidem patriæ causa sapiens facturus sit.* *De Offic.* 1. 45. *J. B.*

<sup>6</sup> *Graviter eos accusat Aristoteles]* Et Plutarchus *Agesilao*: Λακεδαιμόνιοι τὴν πρώτην τοῦ καλοῦ μερίδα τῆς πατρίδος συμφέροντι διδόντες, οὔτε μανθάνουσιν, οὔτε ἐπίστανται δίκαιον ἄλλο, πλὴν ὃ τὴν Σπάρτην αὐξήσει νομιζουσι. *Lacedæmonii pri-*

*mam honesti partem ponentes in patriæ suæ utilitate, jus aliud nec norunt nec discunt, quam unde Spartam putent posse augeri.* (Pag. 617 D.) De iisdem Lacedæmoniis Athenienses apud Thucydidem libro v: πρὸς σφᾶς μὲν αὐτοῦς καὶ τὰ ἐπιχώρια νόμιμα, πλείστα ἀρετῇ χρωῦνται. πρὸς δὲ τοῖς ἄλλοις πολλά ἂν τις ἔχων εἰπεῖν ὡς προσφέρονται, ξυνηλῶν μάλιστα ἂν δηλώσειεν, ὅτι τὰ μὲν ἡδέα καλὰ νομιζουσι, τὰ δὲ ξυμφέροντα δίκαια. Quod ipsos inter se et civilia jura attinet, plurimum virtute utuntur. Quales vero sint adversus alios, multa adferri possint eo pertinentia, breviter autem rem exposuerit, qui dixerit eis honesta videri quæ suavia sunt, justa quæ utilia. (Cap. 105.)

<sup>7</sup> *Qui militari fortitudini justitiam anteposuit]* Agesilao cum Persarum regem magnum audiret appellari, quomodo, inquit, major me est, nisi sit jus-

used the authority of another Spartan king, who gave justice the preference over military courage, on this ground; that courage is to be regulated by justice, but if all men were just, they would have no need of courage. Courage itself was defined by the Stoics, Virtue exercised in defence of Justice. Themistius, in an Oration to Valens, eloquently urges, that kings such as the rule of wisdom requires them to be, ought not to care for the single nation only which is committed to them, but for the whole human race; they should be, as he expresses it, not *philo-macedonian* only, or *philo-roman*, but

find any other authority, was produced, by Grotius mixing together in his memory two stories, both told in Plutarch's *Apophthegmata*: one, of a saying of Agesilao, (or Archidamus,) who, when asked how far the Lacedæmonian territory extended, swung his spear and said, *So far*: the other story, that when Phraates sent to Pompey and begged that the Parthians might have, for their boundary towards the Romans, the Euphrates; Pompey replied that the boundary should be Justice. Tydman (in his Preface) defends Grotius from Barbeyrac's charge of confusion in this quotation.

humani generis, et esse, ut ipse loquitur, non φιλομακέδονα tantum, aut φιλορωμαίους, <sup>u</sup>sed φιλανθρώπους. <sup>x</sup>Minois invisum apud posteros nomen non aliud fecit, quam quod æquitatem imperii sui finibus terminaret.

*Bellumque  
inde belli  
jura.*

25 Tantum vero abest ut admittendum sit quod quidam fingunt, in bello omnia jura cessare, ut nec suscipi bellum debeat nisi ad juris consecutionem, nec susceptum geri nisi intra juris ac fidei modum. Bene<sup>7</sup> Demosthenes bellum esse in eos dixit, qui judiciis coerceri nequeunt. Judicia enim vigent adversus eos qui invalidiores se sentiunt: in eos, qui pares se faciunt aut putant, bella sumuntur; sed nimirum, ut recta sint, non minori religione exercenda, quam judicia exerceri solent.

26 Sileant ergo leges inter arma, sed civiles illæ et judiciaræ et pacis propriæ, non aliæ perpetuæ et omnibus tem-

tor? Et hoc apud Plutarchum. (*Apophthegm.* pag. 213 c.)

<sup>u</sup> Sed φιλανθρώπους] Optime M. Antoninus: πόλις καὶ πατρίς ὡς μὲν Ἀντωνίνῳ μοι ἡ Ῥώμη, ὡς δὲ ἀνθρώπῳ ὁ κόσμος· civitas et patria mihi ut Antonino Roma, ut homini mundus. (Lib. vi. § 44.) Porphyrius *de non esu animalium* III: ὁ λόγῳ ἀγόμενος καὶ πρὸς πολίτην τηρεῖ τὸ ἀβλαβίς, καὶ ἔτι μᾶλλον πρὸς ξένους καὶ πρὸς πάντας ἀνθρώπους, ὁ τὴν ἀλογίαν ἔχων ὑπήκοον καὶ αὐτὸς παρ' ἐκείνους λογικώτερος, διὰ ταῦτα δὲ καὶ θεϊότερος·

*Qui ratione ducitur, innocentiam in cives servat, imo et in peregrinos et homines quosvis, quanto ratione præstantior, tanto divinius.* [Vertendum erat, non immo et in peregrinos &c. ut habet Auctor; sed, magis adhuc in etc. quod alium sensum efficit. Deinde reliqua non omnino adcurate expressa sunt. Ceterum locus est pag. 333. *Ed. Lugd.* 1620. *J. B.*]

<sup>x</sup> Minois] De quo versus est veteris Poetæ:

Καὶ νήσων δειραῖσι βαρὴν ζυγὸν ἔμβαλε Μίνως·

*philanthropic.* The name of Minos became hateful to posterity in no other way than this: that he terminated his equity at the boundaries of his own government.

25 It is so far from being proper to admit, what some choose to say, that in war all rights cease, that war is never to be undertaken except to assert rights; and when undertaken, is never to be carried on except within the limits of rights and of good faith. Demosthenes well said, that war was the mode of dealing with those who could not be kept in order by judicial proceedings. For judicial proceedings are of force against those who feel themselves to be the weaker party: but against those who make themselves or think themselves equals, war is the proceeding; yet this too, in order to be justifiable, to be carried on in a no less scrupulous manner than judicial proceedings are.

26 Be it so then, that, in the conflict of arms, laws must be silent: but let this be understood of laws civil, judicial, proper to peace; not of those laws which are perpetual and accommodated to all time. For

poribus accommodatæ. Optime enim dictum est a Dione Prusænsi, inter hostes scripta quidem jura, id est, civilia non valere, at <sup>v</sup>valere non scripta, id est, ea quæ natura dictat aut gentium consensus constituit. Docet hoc vetus illa Romanorum formula: *eas res puro pioque duello quærendas censeo*. Iidem veteres Romani, ut Varro notabat, bella tarde et nulla licentia suscipiebant, quod bellum nullum nisi pium putabant geri oportere. Camillus juste non minus quam fortiter bella gerenda dicebat: Africanus, populum Romanum et suscipere juste bella et finire: Apud alium legas, *Sunt et belli, sicut et pacis jura*. Alius Fabricium miratur ingentem virum, et quod difficillimum est in bello innocentem, et qui aliquid esse crederet et in hostem nefas.

De Vit. Pop. Rom. apud Non. p. 539.

Liv. v. 27.

Idem xxx. 16.

[[Liv. v. 27.]]

[[Seneca ep. 120.]]

27 Quantam vim habeat in bellis <sup>2</sup>justitiæ conscientia passim ostendunt historiarum scriptores, qui victoriam sæpe

Insula cuncta jugo Minois pressa gemebat.

Vide hac de re Cyrillum *adversus Julianum* libro vi. [Pag. 191. Ed Spanhem. ubi tamen versus paullo aliter refertur. J. B.]

<sup>1</sup> Locus est in Oratione de Chersoneso, pag. 38 c. J. B.

<sup>2</sup> Valere non scripta] Ideo Alfonso rex interrogatus plusne libris an armis deberet, dixit, ex libris se et arma et armorum jura didicisse. Plutarchus: *εἰσὶ δὲ καὶ πολέμων ἕως τινὲς νόμοι τοῖς ἀγαθοῖς ἀνδράσι, καὶ τὸ νικᾶν οὐχ οὕτω διακρίων, ὥστε μὴ φεύγειν τὰς*

*ἐκ κακῶν καὶ δσεβῶν ἔργων χάριτας*. Sunt apud viros bonos quedam et belli jura, nec ita sectanda victoria est, ut non fugiatur utilitas ex pravis impiisque actionibus proveniens. (Vit. Camill. p. 134.)

<sup>2</sup> Justitiæ conscientia] Bene apud Appianum Pompeius: *θαρρῆν δὲ χρὴ τοῖς τε θεοῖς καὶ αὐτῶ τῷ λογισμῷ τοῦ πολέμου καλὴν καὶ δικαίαν ἔχοντι φιλοτιμίαν ὑπὲρ πατρῶν πολιτείαις*. (Bell. Civ. Lib. 11. p. 460.) *confidere oportet Diis et causæ belli honeste justoque suscepti studio ad tuendum patriæ statum*. Cassius apud eundem: *μεγί-*

it is excellently said by Dio Prusænsis, that between enemies, written laws, that is, Civil Laws, are not in force; but that unwritten laws are, namely, those which nature dictates, or the consent of nations institutes. We may learn this from the old Formula of the Romans; *I decide that those things may be sought by a pure and pious war*. The same old Romans, as Varro remarked, undertook war tardily, and without allowing themselves any licence, because they thought that no war except a pious one ought to be undertaken. Camillus said that wars were to be carried on no less justly than bravely. Africanus said, that the Romans began just wars, and ended them. Again, in Livy we read, *War has its laws no less than peace*. And Seneca admires Fabricius as a great man, and, what is most difficult, a man innocent even in war, and who thought that there were wrongs even towards an enemy.

27 How great the power of the conscience of justice is, the writers of histories everywhere shew, often ascribing victory to this cause

*Iusta causæ  
conscientia,  
quæ vis ejus.*

huic causæ præcipue asscribunt: Inde proverbialia illa, frangi et attolli vires in milite a causa: raro eum sospitem redire<sup>8</sup> qui injusta arma sumserit: bonæ<sup>9</sup> causæ spem adesse comitem; et alia in eum sensum. Nec movere quenquam debent prosperi successus iniquarum molitionum: satis enim est quod causæ æquitas suam quandam eamque magnam habet vim ad agendum, quanquam ea vis, ut in rebus humanis accidit<sup>1</sup>, sæpe aliarum causarum oppositu ab effectu impeditur. Etiam ad amicitias conciliandas, quibus ut singuli, ita et populi ad multas res opus habent, multum valet opinio de bello non temere nec injuste suscepto, pieque gesto. Nemo enim iis se facile adjungit quibus jus, fas, fidem vilia putat.

στη δ' ἐλπὶς ἐν τοῖς πολέμοις ἐστὶ τὸ δίκαιον· *In bellis spes optima est, causa jus.* (Ibid. Lib. iv. p. 645.) Josephus xv. *Antiquæ Historiæ*: μεθ' ὧν τὸ δίκαιον, μετ' ἐκείνων δ' ὁ θεός· *Ab quo stat jus, ab eo Deus* (cap. v. § 3. pag. 753. *Edit. Huds.*) Multa sunt apud Procopium in hanc sententiam: ut in oratione Bellisarii in itinere in Africam, ubi hoc inter cetera: τὸ ἀνδρείον οὐκ ἂν νικῶν μὴ μετὰ τοῦ δίκαιου ταττόμενον· *Victoriam fortitudo datura non est, nisi justitiam habeat commilitem;* (*Bell. Vand. Lib. i. c. 12.*) et in altera oratione ante prælium non longe a Carthagine: (Ibid. c. 19.) et in Longobardorum sermone ad Herulos, ubi hæc, sed correctæ a nobis: μαρτυριζόμενοι τὸν θεὸν οὐπερ τῆς ῥοπῆς καὶ βραχεῖά τις τὸ παράπαν ἰκμάς πάσῃ τῇ ἀνθρώπων δυνάμει

ἀντιζῶνς ἔσται, αὐτὸν τε εἰκὸς ταῖς πολέμου αἰτίας ἠγμένον, ἀμφοτέροις πρυτανεύσαι τῆς μάχης τὸ πέρας· *Testatur Deum, cujus potentia vel minima particula omnem humanam vim æquiparat; is, ut credibile est, belli causas intuens, dabit debitum utrisque prælii exitum.* (*Bell. Gotth. Lib. ii. c. 14.*) Quod dictum eventus mox admirabilis comprobatur. Sic et apud eundem scriptorem ad *Gotthos Totilas*, (Lib. iii. c. 8): οὐ γὰρ ἐστίν, οὐκ ἐστὶ τὸν ἀδικοῦντα καὶ βιαζόμενον ἐν τοῖς ἀγῶσι εὐδοκίμειν, ἀλλὰ πρὸς τὸν βίον ἐκάστου ἢ τοῦ πολέμου πρυτανεύεται τύχη· *Fieri nequit, nequit, inquam, fieri, ut qui violentia et injustitia utuntur, decus pugnando pariant, sed prout vita cuique est, ita ei obtingit belli fortuna.* Mox capta jam Roma alteram habet orationem To-

mainly. Hence have arisen these proverbs; That it is the Cause which makes the soldier brave or base: that he rarely comes safe back who goes out on the bad side: that Hope is the ally of the good Cause: and others to the same effect. Nor ought any persons to be moved by the occasional success of unjust designs; for it is enough if the equity of the cause has an efficacy, and that a great one, in action; even though this efficacy, as happens in human affairs, is often prevented from taking effect, being counteracted by other causes. And further; in conciliating friendships, which nations, as well as individuals, need, on many accounts, a great effect must be assigned to an opinion that we do not hastily or unjustly undertake war, and that we carry it on religiously. For no one readily joins himself to those whom he believes to think lightly of right laws and good faith.

28 Ego cum ob eas quas jam dixi rationes compertissimum haberem, esse aliquod inter populos jus commune, quod et ad bella et in bellis valeret, cur de eo instituerem scriptio-nem causas habui multas ac graves. Videbam per Christianum orbem vel barbaris gentibus pudendam bellandi licentiam: levibus aut nullis de causis ad arma procurri, quibus semel sumtis nullam jam divini, nullam humani juris reverentiam, plane quasi uno edicto ad omnia scelera emisso furore.

29 Cujus immanitatis conspectu multi homines minime mali eo venerunt, ut Christiano, cujus disciplina in omnibus hominibus diligendis præcipue consistit, <sup>a</sup> omnia arma interdi-cerent: ad quos accedere interdum videntur et Joannes Ferus

tilas, (Lib. III. c. 21.) pertinentem eodem. Agathias vero libro II. *ἀδικία γὰρ καὶ θεοῦ ἀθραπευσία φευκτὰ μὲν δὲ καὶ ἀσύμφορα. μάλιστα δὲ ἐν τῷ προ-πολεμῆν καὶ παρατάττεσθαι. Injus-titia et Dei neglectus, vitanda semper et noxia, tum vero maxime ubi res belli in acie cernitur.* (Lib. II. c. 1.) Probat id alibi Darii, Xerxis, et Atheniensium in Sicilia illustribus exemplis. (Ibid. c. 5.) Vide si libet et Crispini orationem ad Aquileienses apud Herodianum VIII. (c. 6.) Apud Thucydidem libro VII. Lacedæmonii clades ad Pylum et alibi acceptas suas culpæ acceptas ferunt, quod judicium provocati accipere recu-sassent. Sed cum postea Athenienses multis editis improbis facinoribus judi-cium defugissent, spes inde meliorum successuum ad Lacedæmonios rediit.

(Cap. 18.)

<sup>a</sup> Ita habet fragmentum ex EURIPI-DIS *Erechtheo* :

*Οὐδείς στρατεύσας ἀδικα σὺς ἦλθεν πάλιν.*  
Vers. 44. Collect. Barnes. [ap. Dindorf. *Fragm. v.*]

<sup>b</sup> Innuere videtur illud LUCANI :

*Causa jubet melior Superos sperare secundos.*  
*Pharsal. VII. 349.* Adde MENANDRI fragmentum e *Vulcanalibus*, pag. 190. *Edit. Cleric.* et loca ab Auctore nostro infra adferenda, Lib. II. c. 1. § 1. *J. B.*

<sup>c</sup> *Nam sæpe honestas rerum causas, ni judicium adhibeas, perniciosi exitus consequuntur.* Ita Otho apud TACI-TUM, *Hist. I. 83. J. B.*

<sup>d</sup> *Omnia arma interdicerent*] Tertul-lianus *de Resurrectione Carnis: Gladius bene de bello cruentus et melior homicida.* (Cap. 16.)

III.  
*Causæ auctori  
operis scri-  
bendi.  
Bellandi li-  
centiam mo-  
derandi.*

28 I, for the reasons which I have stated, holding it to be most certain that there is among nations a common law of Rights which is of force with regard to war, and in war, saw many and grave causes why I should write a work on that subject. For I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint.

29 And the sight of these atrocities has led many men, and these, estimable persons, to declare arms forbidden to the Christian, whose rule of life mainly consists in love to all men: and to this party sometimes John Ferus and our countryman Erasmus seem to

et Erasmus<sup>2</sup> nostras, viri pacis et Ecclesiasticæ et civilis aman-  
tissimi; sed eo, ut arbitror, consilio, quo solemus, quæ in  
unam partem exierunt, in alteram reflectere, ut in verum mo-  
dum redeant. Verum hic ipse nimium contranitendi conatus  
sæpe adeo non proficit, ut obsit etiam, quia deprehensum  
facile quod in his nimium est, etiam aliis dictis intra verum  
stantibus auctoritatem detrahit. Medicina ergo utrisque ad-  
hibenda fuit, tum ne nihil, tum ne omnia crederentur licere.

*Jurispruden-  
tiam Juvandi  
studium, ex-  
emplo me-  
thodi.*

30 Simul et jurisprudentiam, quam antehac in muneribus  
publicis quanta potui integritate exercui, nunc quod mihi in-  
digne e patria tot meis laboribus ornata ejecto restabat, pri-  
vatæ diligentæ studio adjuvare volui. Artis formam ei impo-  
nere multi antehac destinarunt: perfecit nemo: neque vero  
feri potest, nisi, quod non satis curatum est hactenus, ea quæ  
ex constituto veniunt a naturalibus recte separentur: nam  
naturalia, cum semper eadem sint, facile possunt in artem col-  
ligi: illa autem, quæ ex constituto veniunt, cum et mutantur  
sæpe, et alibi alia sint, extra artem posita sunt, et aliæ rerum  
singularium perceptiones.

<sup>2</sup> Vide Viri magni *Adagia*, ubi in tritum illud: *Dulce bellum inexpertis.*  
hanc rem fuse digreditur, dum exponit *J. B.*

approximate, men much devoted to peace, both ecclesiastical and  
civil: but they take this course, as I conceive, with the purpose with  
which, when things have been twisted one way, we bend them the  
other, in order to make them straight. But this attempt to drive  
things too far, is often so far from succeeding, that it does harm; be-  
cause the excess which it involves is easily detected; and then, de-  
tracts from the authority of what is said, even within the limits of  
truth. We are to provide a remedy for both disorders; both for  
thinking that nothing is allowable, and that everything is.

30 Moreover, having practised jurisprudence in public situations  
in my country with the best integrity I could give, I would now, as  
what remains to me, unworthily ejected from that country graced by  
so many of my labours, promote the same subject, jurisprudence, by  
the exertion of my private diligence. Many, in preceding times, have  
designed to invest the subject with the form of an Art or Science;  
but no one has done this. Nor can it be done, except care be taken  
in that point which has never yet been properly attended to;—to  
separate Instituted Law from Natural Law. For Natural Law, as  
being always the same, can be easily collected into an Art: but that  
which depends upon institution, since it is often changed, and is dif-  
ferent in different places, is out of the domain of Art; as the per-

31 Quod si qui veræ justitiæ sacerdotes naturalis et perpetuæ jurisprudentiæ partes tractandas susciperent, semotis iis quæ ex voluntate libera ortum habent, alius quidem de legibus, alius de tributis, alius de judicum officio, alius de voluntatum conjectura, alius de factorum facienda fide, posset deinde ex omnibus partibus collectis corpus confici.

32 Nos certe quam viam ineundam censeremus re ipsa potius quam verbis ostendimus in hoc opere, quod partem jurisprudentiæ longe nobilissimam continet. IV.  
Operis com-  
tentia et ordo.

33 Primo enim libro præfati de juris origine generalem examinavimus quæstionem, sitne bellum aliquod justum: deinde ad noscenda publici privatiq; belli discrimina explicandam habuimus vim ipsam summi imperii, qui eam populi, qui reges solidam, qui ex parte, qui cum alienandi jure, qui aliter habeant: deinde et de subditorum in superiores officio dicendum fuit. Lib. I.

34 Liber secundus cum omnes causas, ex quibus bellum oriri potest, exponendas sumserit, quæ res communes sint, quæ propriæ, quod jus personis in personas, quæ ex dominio nascatur obligatio, quæ successionum regiarum norma, quod jus Lib. II.

ceptions of individual things in other cases also is.

31 If, then, those who have devoted themselves to the study of true justice would separately undertake to treat of separate parts of Natural and Permanent Jurisprudence, omitting all which derives its origin from the will of man alone:—if one would treat of Laws; another, of Tributes; another, of the Office of Judges; another, of the mode of determining the Will of parties; another, of the Evidence of facts; we might, by collecting all these parts, form a complete body of such Jurisprudence.

32 What course we think ought to be followed in the execution of such a task, we show by act rather than by words, in this present work; in which is contained by far the noblest part of Jurisprudence.

33 For in the First Book, (after a Preface concerning the origin of Rights and Laws,) we have examined the question whether any war be just: next, in order to distinguish between public and private war, we have to explain the nature of sovereignty; what Peoples, what Kings, have it entire; what, partial; who, with a right of alienation; who, otherwise; and afterwards we have to speak of the duty of subjects to superiors.

34 The Second Book, undertaking to expound all the causes from which war may arise, examines what things are common, what are property, what is the right of persons over persons, what obliga-

veniat ex pacto aut contractu, quæ federum, quæ jurisjuranditum privati, tum publici vis atque interpretatio, quid ex damno dato debeatur, quæ legatorum sanctimonia, quale jus humani mortuos, quæ pœnarum natura, late exsequitur.

Lib. iii.

35 Tertius liber primum subjectam sibi habens materiam, id quod in bello licet, cum id quod impune fit aut etiam apud populos externos pro jure defenditur ab eo quod vitio caret distinxisset, descendit ad pacis genera, et omnes bellicas conventiones.

V.  
Scriptorum  
necessitas.

36 Eo autem majus visum est pretium operæ, quod ut dixi totum hoc argumentum tractavit nemo, et qui tractarunt partes, ita tractarunt, ut multum reliquerint alienæ industriæ. Veterum philosophorum nihil exstat hujus generis, neque Græcorum, quos inter Aristoteles librum fecerat cui nomen *δικαι-*

Scriptorum  
veterum hac  
in re inopia.

<sup>b</sup> *Wilhelmo Matthei*] Adde his Johannem de Carthagena editum Romæ anno c10 loc ix.

<sup>a</sup> In omnibus Editionibus hæcenus

legebatur Fr. Ario: sed Auctor ille Hispanus Arias vacabatur, et hoc nomine editus est ejus liber *De Bello et ejus justitia*, in TRACTATU TRACTATUUM, Tom.

tion arises from ownership, what is the rule of royal succession, what right is obtained by pact or contract, what is the force and interpretation of treaties, of oaths private and public, what is due for damage done, what is the sacredness of ambassadors, the right of burying the dead, and the nature of punishments.

35 The Third Book has for its subject, in the first place, what is lawful in war; and when it has drawn a distinction between that which is done with impunity, or may even, in dealing with foreigners, be defended as consistent with Rights; and that which is really free from fault; it then descends to the kinds of Peace and to Conventions in War.

36 The undertaking such a work appeared to me the more worthy of the labour which it must cost, because, as I have said, no one has treated the whole of the argument; and those who have treated parts thereof, have so treated them that they have left much to the industry of others. Of the old philosophers nothing is extant of this kind, neither of the Greeks, among whom Aristotle is said to have written a book called the *Laws of War*\*, nor of those (the Fathers) who wrote as Christians in the early period of the Church; which is much to be regretted; and even of the books of the ancient Romans concerning the Law recognized by their *Feciales*, or *Heralds' College*, we have received nothing but the name. [See *Cic. Off.* i. 11; iii. 29.] Those who have made what they call *Summæ of Cases of*

\* But the true reading is *Δικαιώματα πόλεων*, the *Laws of States*. J. B.



ῶματα πολέμων, neque eorum qui Christianismo recenti nomen dederunt, quod valde optandum fuerat: etiam Romanorum veterum libri de jure feicali nihil ad nos sui præter nomen transmiserunt. Hi qui summas fecerunt casuum quos vocant conscientiae, ut de aliis rebus, ita et de bello, de promissis, de juramento, de repressaliis capita fecerunt. [Vide infra  
lib. 3. 7. J. B.]

37 Vidi et speciales libros *de Belli Jure* partim a theologis scriptos, ut a Francisco Victoria, Henrico Gorichemo, <sup>b</sup>Wilhelmo Matthæi; partim a doctoribus juris, ut Joanne Lupo, <sup>3</sup>Francisco Aria, Joanne de Lignano, Martino Laudensi: sed hi omnes de uberrimo argumento paucissima dixerunt, et ita plerique, ut sine ordine quæ naturalis sunt juris, quæ divini, quæ gentium, quæ civilis, quæ ex canonibus veniunt, permiscerent atque confunderent. Recentiorum defectus.

xvi. *Ed. Venet. 1584.* Ibidem reperiuntur JOANNES LUPUS, Segobiensis, *De Bello et Bellatoribus*: JOANNES à LIGNANO, Bononiensis, *De Bello*: et MAR-

TINUS GARATUS, Laudensis, de eodem argumento. Postremus, simul cum AYALA, *De Jure et Officiis Bellicis*, editus est etiam Lovanii, ann. 1648. J. B.

*Conscience*, have introduced chapters, as concerning other things, so concerning war, concerning promises, concerning oaths, concerning reprisals.

37 I have also seen special books concerning the Laws of War, written partly by theologians, as Francis Victoria\*, Henry Gorichem†, William Matthæi [Mathison?], Johannes de Carthagena‡; some by Doctors of Law, as Johannes Lupus§, Francis Arias||, Joannes à Lignano¶, Martinus Laudensis\*\*. But all these have said very little, considering the copiousness of the argument; and said it in such a way that they have mingled and confounded law natural, law divine, law of nations, civil law, and canon law.

\* A Spanish Dominican who lived in the 16th century. The treatise here mentioned is *De Indis et Jure Belli*, and appears among his twelve theological lectures.

† A Dutchman so named from the place of his birth, and chancellor of Cologne. He lived about the middle of the fifteenth century, and wrote a treatise *De Bello Justo*.

‡ His book was printed at Rome in 1609.

§ A native of Segovia. His Treatise *De Bello et Bellatoribus* may be found in a large collection called *Tractatus Tractatum*. Tom. xvi, of the Venice edition, 1584.

|| A Spaniard. His book is in the same volume of the same collection, under the title *De Bello et ejus Justitia*.

¶ A native of Bologna. His Treatise *De Bello* is in the same volume.

\*\* His name was Garat. His Treatise *De Bello* appears in the same volume of the Collection. It was reprinted at Louvain in 1648, with the Treatise of Ayala, spoken of afterwards.

38 Quod his omnibus maxime defuit, historiarum lucem supplere aggressi sunt eruditissimus Faber in *Semestrium capitibus* nonnullis, sed pro instituti sui modo, et testimoniis tantum allatis; diffusius, et ut ad definitiones aliquas exemplorum congeriem referrent, Balthazar Ayala, et plus eo Albericus Gentilis: cujus diligentia sicut alios adjuvari posse scio et me adjutum profiteor, ita quid in dicendi genere, quid in ordine, quid in distinguendis quæstionibus, jurisque diversi generibus desiderari in eo possit, lectoribus judicium relinquo. Illud tantum dicam, solere eum sæpe in controversiis definiendis sequi aut exempla pauca non semper probanda, aut etiam auctoritatem novorum jurisconsultorum in responsis, quorum non pauca ad gratiam consulentium, non ad æqui bonique naturam sunt composita. Causas, unde bellum justum aut injustum dicitur, Ayala non attingit: Gentilis summa quæ-

\* Ita reposuimus pro eo, quod erat in omnibus Edd. *docendi genere*. Nimirum non congruit stylo Auctoris nostri, ad brevitatem maximam, si quis usquam, composito, ut ita idem bis di-

ceret, quum sequentia ad modum docendi pertineant, et hoc primum caput ab aliis manifesto distinguatur. Deinde non potuit non multa improbare in *genere dicendi*, quo usus est Albericus

38 What was most wanting in all these, namely, illustrations from history, the learned Faber\* has undertaken to supply in some chapters of his *Semestria*: but no further than served his own special purpose, and only giving references. The same has been done more largely, and that, by applying a multitude of examples to certain maxims laid down, by Balthazar Ayala †, and still more largely by Albericus Gentilis ‡; whose labour, as I know it may be serviceable to others, and confess it has been to me, so what may be faulty in his style, in his arrangement, in his distinctions of questions, and of the different kinds of Law, I leave to the judgment of the reader. I will only say, that in the decision of controversies he is often wont to follow, either a few examples that are not always to be approved of, or else the authority of modern lawyers in opinions given, not a few of which are accommodated to the interest of those that consult them, and not founded upon the nature of equity and justice. The

\* Peter du Faur of St Jori, Councillor of the Grand Council, afterwards Master of Requests, and at last First President of the Parliament of Thoulouse. He was scholar to Cujas. His work entitled *Semestrium Libri Tres* has been several times printed at Paris, Lyons, and Geneva.

† He was a native of Antwerp, of Spanish extraction. His Treatise *De Jure et Officiis Bellicis* was printed at that city in 1597.

‡ Professor at Oxford about 1600. His book is *De Jure Belli*.

dam genera quo ipsi visum est modo delineavit; multos vero et nobilium et frequentium controversiarum locos ne attigit quidem.

39 Nos ne quid tale indictum abiret, operam dedimus, VI. indicatis etiam dijudicationum fontibus, unde facile esset etiam si quid omissum a nobis esset definire. Superest ut quibus ego auxiliis et qua cura hanc rem aggressus sim breviter exponam. Primum mihi cura hæc fuit, ut eorum quæ ad jus naturæ pertinent probationes referrem ad notiones quasdam tam certas, ut eas nemo negare possit, nisi sibi vim inferat<sup>5</sup>. Principia enim ejus juris, si modo animum recte advertas, per se patent atque evidentiæ sunt, ferme ad modum eorum quæ sensibus externis percipimus; qui et ipsi bene conformatis sentiendi instrumentis, et si cetera necessaria adsint, non fallunt. Ideo in Phœnissis Euripides sic loquentem facit Polynicen, cujus aperte justam vult fuisse causam :

1. Cura Auctoris,  
1. Jura probandi :  
Naturale.

Vers. 497, et seqq.

Gentilis : et ipse tacite videtur ei opponere illud, quo usum se profitetur, § 59. J. B.

Præfatione nostra ad PUFENDORFIUM *De Jure Nat. et Gent.* § 1, et seqq. J. B.

<sup>5</sup> De illa evidentiæ fuscæ egimus in

causes for which a war is denominated just or unjust, Ayala has not so much as touched upon : Gentilis has indeed described, after his manner, some of the general heads ; but many prominent and frequent cases of controversy he has not even touched upon.

39 We have been careful that nothing of this kind be passed over in silence ; having also indicated the sources from which we derive our judgments, so that it may be easy to determine any question that may happen to be omitted by us. It remains now that I briefly explain with what aids, and with what care, I undertook this work.

In the first place, it was my object to refer the truth of the things which belong to Natural Law to some notions, so certain, that no one can deny them, without doing violence to his own nature. For the principles of such Natural Law, if you attend to them rightly, are of themselves patent and evident, almost in the same way as things which are perceived by the external senses ; which do not deceive us, if the organs are rightly disposed, and if other things necessary are not wanting. Therefore Euripides in his *Phœnissæ* makes Polynices, whose cause he would have to be represented manifestly just, express himself thus :

I speak not things hard to be understood,  
But such as, founded on the rules of good  
And just, are known alike to learn'd and rude.

Hæc sum profatus, mater, haud ambagibus  
 Implicita, sed quæ regulis æqui et boni  
 Suffulta c rudibus pariter et doctis patent.

Statim addit chori (constat is autem ex feminis iisque barbaris,) iudicium, dicta approbantis.

40 Usus sum etiam ad juris hujus probationem d testimoniis philosophorum, historicorum, poetarum, postremo et oratorum: non quod illis indiscrete credendum sit; solent enim sectæ, argumento, causæ servire: sed quod ubi multi diversis temporibus ac locis idem pro certo affirmant, id ad causam universalem referri debeat: quæ in nostris quæstionibus alia esse non potest, quam aut recta illatio ex naturæ principii procedens, aut communis aliquis consensus. Illa jus naturæ indicat, hic jus gentium: quorum discrimen non quidem ex ipsis testimoniis, (passim enim scriptores voces juris naturæ et gentium permiscet) sed ex materiæ qualitate intelligendum est. Quod enim ex certis principii certa argumentatione

Gentium.

2. Discriminandi utrumque.

c Rudibus pariter et doctis patent]

Idem Euripides Andromacham Her-  
 mionæ dicenti, (vers. 242):

Οὐ βαρβάρων νόμοισιν οἰκοῦμεν πόλιν.  
 Non barbarorum more in urbe hæc vivitur.

respondentem facit:

Ἐφεί τὰ γ' αἰσχρὰ κἀνάδ' αἰσχρόν η̄χει.

Quæ turpia illa, hic quoque haud culpa vacant.

[In hanc sententiam dixit CASSIODORUS: *Laboriosum quidem, sed non est impossibile, justitiam suadere mortali-*

And he immediately adds the judgment of the chorus, (which consisted of women, and these too barbarians,) approving what he said.

40 In order to give proofs on questions respecting this Natural Law, I have made use of the testimonies of philosophers, historians, poets, and finally orators. Not that I regard these as judges from whose decision there is no appeal: for they are warped by their party, their argument, their cause: but I quote them as witnesses whose conspiring testimony, proceeding from innumerable different times and places, must be referred to some universal cause; which, in the questions with which we are here concerned, can be no other than a right deduction proceeding from the principles of reason, or some common consent. The former cause of agreement points to the Law of Nature; the latter, to the Law of Nations: though the difference of these two is not to be collected from the testimonies themselves, (for writers everywhere confound the Law of Nature and the Law of Nations,) but from the quality of the matter. For what cannot be deduced from certain principles by solid reasoning, and yet is seen and observed everywhere, must have its origin from the will and consent of all.

41 I have, therefore, taken pains to distinguish Natural Law from

deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate libera ortum habeat.

41 Itaque hæc duo non minus inter se, quam a jure civili Civile. discernere semper unice laboravi: imo et in gentium jure discrevi id quod vere et ex omni parte jus est, et id quod duntaxat effectum quendam externum ad instar illius primitivi juris parit: nempe ne vi resistere liceat, aut etiam ut ubique Species eujusque. vi publica, utilitatis alicujus causa, vel ut incommoda gravia vitentur, defendi debeat: quæ observatio quam sit necessaria ad res multas, in ipso operis contextu apparebit. Non minus sollicite superavimus ea, quæ juris sunt stricte ac proprie dicti, unde restitutionis obligatio oritur, et ea quæ juris esse dicuntur, quia aliter agere, cum alio aliquo rectæ rationis dictato pugnat: de qua juris diversitate aliquid jam et supra diximus.

42 Inter philosophos merito principem obtinet locum Aristoteles, sive tractandi ordinem, sive distinguendi acumen, sive rationum pondera consideres. Utinam tantum principia II. Auxilia scripta.  
I. Philosophi. Aristoteles, ejus laus.

*bus: quam ita cunctorum sensibus beneficium Divinitatis adtribuit, ut et qui nesciunt jura, rationem tamen veritatis adgnoscant. Necessè est enim, ut quod a natura conceditur, submonitione iterum eadem, suaviter audiatur.* Varr. VII.

26. J. B.]

<sup>d</sup> Testimoniis philosophorum] Quidni, cum Alexander Severus Ciceronis de republica et officiis libros perpetuo lectitarit? [Lamprid. in ejus Vit. c. 30.]

the Law of Nations, as well as both from the Civil Law. I have even distinguished, in the Law of Nations, that which is truly and universally lawful, true Rights; and *quasi*-Rights, which only produce some external effect similar to that of the true Rights: for instance, this effect; that they may not be resisted by force, or may even be defended by force, in order to avoid grave inconvenience. [Such *quasi*-Rights are those of a Master over his slave, where slavery is established by Law. W.] How necessary this observation is in many instances, will appear in the course of the work. No less careful have I been to separate those things which belong to *Jus*, or *Right*, properly and strictly so called, (out of which arises the obligation of restitution,) and those which are more laxly described by *right*, adjectively; because to act otherwise is at variance with some dictate of right reason; concerning which diversity of *Jus* or *Right* we have already said something above.

42 Among the philosophers, the first place is deservedly assigned to Aristotle; whether we regard the order of his treatment of these subjects, or the acuteness of his distinctions, or the weight of his reasons. Only it were to be wished that his authority had not, some

tu<sup>s</sup> ille ab aliquot hinc sæculis non in tyrannidem abiisset, ita ut veritas, cui Aristoteles fidelem navavit operam, nulla jam re magis opprimatur quam Aristotelis nomine. Ego et hic et alibi veterum Christianorum sequor libertatem, qui in nullius philosophorum sectam juraverant, non quod eis assentirentur qui nihil percipi posse dicebant, quo nihil est stultius; sed quod nullam esse sectam putarent, quæ omne verum vidisset, et nullam quæ non aliquid ex vero. Itaque <sup>e</sup>veritatem sparsam per singulos, per sectasque diffusam, in corpus colligere, id vero existimabant nihil esse aliud quam vere Christianam tradere disciplinam.

*Reprehensio.*

43 Inter cetera, ut hoc obiter a nostro instituto non alienum dicam, non sine causa videntur mihi ab Aristotele discedere et <sup>e</sup>Platonici nonnulli <sup>f</sup>et Christiani veteres, in eo quod

<sup>e</sup> *Veritatem sparsam per singulos*  
Verba sunt Lactantii *Institutionum* VII. cap. 7. Justinus *Apologetico* priore: [Cap. 13. pag. 200. *Edit. Otto*, ubi *secunda ista Apologia* habetur.] οὐχ ἔστι ἀλλότριά ἴστι τὰ Πλάτωνος διδάγματα τοῦ Χριστοῦ, ἀλλ' ἔστι οὐκ ἔστι πάντη ὁμοία. ὡς περ οὐδὲ τὰ τῶν ἄλλων Στωϊκῶν τε καὶ ποιητικῶν καὶ συγγραφέων. ἕκαστος γάρ τις ἀπὸ μέρους τοῦ οὐπερματικῆς [θελοῦ] λόγου τὸ συγγενὲς ὁρῶν καλῶς ἐφθέγγετο. *Non quod plane aliena sint Platonis dogmata a Christi dogmatibus, sed quod nec plane convenient, ut nec aliorum*

*dogmata, puta Stoicorum, poetarum, et historie scriptorum. Eorum enim quæque ab insita ratione [divina] id, quod ei consentaneum est, ex parte videns eatenus recte dixit.* Tertulliano, Seneca sæpe noster, (Lib. *de Anima*, cap. 20.) sed, ut idem nos monet, [*adversus Judæos*, cap. 9.] nulli hominum universalitas spiritualium documentorum competeat, nisi in Christum. Augustinus epistola CCII: *Mores illi, quos Cicero philosophique alii commendant, in ecclesiis toto orbe crescentibus docentur atque discuntur.* Vide si vacat hac super eundem Augustinum de Platonici,

ages ago, been converted into a tyranny by others; so that Truth, in the pursuit of which Aristotle faithfully spent his life, suffers no oppression so great as that which is inflicted in Aristotle's name. I, both here and in other places, follow the liberty of the old Christians, who did not pin their faith to any sect of philosophers; not that they agreed with those who say that nothing can be known; than which nothing is more foolish; but that they thought that there was no sect which had seen the whole of the truth, and none which had not seen some part of the truth. They therefore aimed at collecting the truth which was diffused among individual philosophers, and among sects, into one body: and they thought that this result could be nothing else but the true Christian doctrine.

43 Among other points, to mention this in passing, as not foreign to our purpose, it appears to me that both some of the Platonists and the ancient Christians had good reason to depart from Aristotle's doc-

ille naturam ipsam virtutis in mediocritate affectuum actionumque posuerit: quod semel positum eo ipsum abduxit, ut et virtutes diversas, puta liberalitatem et parsimoniam, in unam compingeret; et veritati daret opposita minime ex æquo respondentia, jactantiam et dissimulationem; et quibusdam rebus vitii nomen imponeret, quæ aut non existunt, aut vitia per se non sunt, ut contemptum voluptatis et honorum, et iræ adversus homines vacuitatem.

44 Non recte autem universaliter positum hoc fundamentum vel ex justitia apparet, cui oppositum nimium et parum, cum in affectibus et sequentibus eos actionibus invenire non posset, in rebus ipsis circa quas justitia versatur utrumque quæsit: quod ipsum primum est desilire de genere in genus alterum, quod in aliis merito culpatur: deinde minus suo acci-

*Virtus non  
omnis vitium  
habet in ex-  
cessu.*

quos paucis mutatis ait Christianos esse epistola LVI. (CXVIII. secundum divisionem Edit. nov. Benedictin.) et de vera religione capite lli. et confessionum libro VII. c. 9. et libro VIII. cap. 2. [Potest etiam hac de re videri CLEMENS ALEXANDRINUS, præsertim Strom. Lib. 1. c. 7. ibique recentissimum Editorem, J. Potterum, Episcopum Oxoniensem, pag. 338. Adde OLEARIJ Dissert. De Philosophia Eclectica, subjectam Versioni Stanleiani Operis de Historia Philosoph. cap. 4. pag. 1216. Ceterum de Seneca etiam apud HIERONYMUM reperio: Scripserunt ARISTOTELES, et

PLUTARCHUS, et NOSTER SENECA, de Matrimonio libros, etc. Ubi tamen ERASMUS: nostrum vocat, quia Latinus. Quod verisimilius est. J. B.]

<sup>6</sup> PLUTARCHUS disertè adfirmat, οὐκ ἀκασαν ἀρετὴν μεσότητι γίνεσθαι. Lib. De Virtute Morali, pag. 444 c. Quod quomodo intelligat et probet, videre poteris ibi, et seqq. pag. J. B.

<sup>7</sup> Et Christiani veteres] Late hoc persequitur Lactantius libro vi. institutionum, capitibus xv. xvi. xvii. Cassiodorus: non affectibus moveri, sed secundum eos moveri utile vel noxium.

trine, in which he placed the very nature of Virtue in a *medium* of the affections and actions: which having once laid down, carried him so far, that he compounded Liberality and Frugality, two very different virtues, into one virtue; and assigned to Truth, two opposites which are by no means co-ordinate, Boasting and Dissimulation; and fastened upon some things the name of vices, which either do not exist, or are not, of themselves, vices; as the contempt of pleasure, and of honour, and a lack of irascibility towards men.

44 That this foundation of virtue, [that it is the *medium* between two extremes,] is not a right one, appears from the example of Justice itself; for the *too much* and *too little* which are opposed to this, since he cannot find in the affections and the consequent actions, he seeks them in the things with which justice deals; which proceeding is, in the first place, a transition to another genus; a fault which he justly blames in others. And in the next place, to take less than is one's

pere, potest quidem adventitium habere vitium, ex eo quod quis pro rerum circumstantiis sibi ac suis debeat; at certe cum justitia pugnare non potest, quæ tota in alieni abstinencia posita est. Cui hallucinationi similis illa est, quod adulterium ex libidine, cædem ex ira proprie ad injustitiam pertinere non vult; cum tamen injustitia non aliam naturam habeat, quam alieni usurpationem; nec referat, ex avaritia illa, an ex libidine, an ex ira, an ex imprudente misericordia proveniat, an ex cupiditate excellendi, unde maximæ injuriæ nasci solent. Nam qualiacunque incitamenta contemnere hac tantum de causa, ne societas humana violetur, hoc vero justitiæ proprium est.

45 Ut redeam unde veneram, verum quidem est virtutibus nonnullis accidere, ut affectus moderentur, sed hoc non ideo quod id sit virtuti omni proprium atque perpetuum; sed quia recta ratio, quam virtus ubique sequitur, <sup>ε</sup>in quibusdam modum sequendum dicit, in quibusdam ad summa incitat.

*In summis  
sæpe con-  
stitit.*

*ε In quibusdam modum sequendum dicit, in quibusdam ad summa incitat] Agathias libro v. in Oratione Belisarii: τῶν γὰρ τῆς ψυχῆς κινήματων, τὰ μὲν ὅσα πεφύκασι καθαρὸν ἔχειν καὶ ἀκραιφνῆς τὸ αἰρετὸν καὶ καθήκον, τούτων*

*ἐντελιῶς καὶ δὴ ἀνεκτέον. οἷς δὲ μέτεστι καὶ τῆς πρὸς τἀναντία τροπῆς καὶ ἐκνεύσεως, τούτοις οὐ διὰ πάντων χρηστέον, ἀλλ' ἐς ὅσον ἔχουσι τὸ συμφέρον. τὸ μὲν οὖν φρονεῖν ἀμιγῆς ἀγαθὸν καὶ ἀνόθευτον ἅπαντες εἶναι φη-*

own, may indeed have a vice adventitiously connected with it, growing out of a consideration of what a person, under the circumstances, owes to himself and those who depend on him; but certainly cannot be repugnant to justice, which resides entirely in abstaining from what is another's. And to this mistake that other is similar, that adultery as the fruit of lust, and homicide arising from anger, he will not allow to belong properly to injustice; though injustice is nothing else in its nature than the usurpation of what is another's; nor does it make any difference whether that proceeds from avarice, or from lust, or from anger, or from thoughtless compassion; or on the other hand, from the desire of superiority, in which the greatest examples of unjust aggressions originate. For to resist all impulses on this account only, that human society may not be violated, is what is really the proper character of justice.

45 To return to the point from which I started, it is true that it belongs to the character of certain virtues, that the affections are kept in moderation; but it does not follow that this is the proper and universal character of all virtue; but that Right Reason, which virtue everywhere follows, dictates that in some things a medium course is to be followed, in others, the highest degree of the affection is to be



Nam Deum nimium colere non possumus: superstitio enim non eo peccat, quod Deum nimium colat, sed quod perverse: neque æterna bona nimium possumus appetere, neque æterna mala nimium formidare: neque peccata nimium odisse. Vere Lib. iv. 9. igitur a Gellio dictum, esse quædam quorum amplitudines nullis finibus cohibeantur, et quæ quanto majora auctioraque sint, etiam tanto laudatiora sint. Lactantius, cum multum de affectibus disseruisset, *Non in his moderandis, inquit, sapientiæ ratio versatur, sed in causis eorum; quoniam extrinsecus commoventur: nec ipsis potissimum frenos imponi oportuit, quoniam et exigui possunt in maximo crimine, et maximi possunt esse sine crimine.* Nobis propositum est Aristotelem magni facere, sed cum ea libertate quam ipse sibi in suos magistros veri studio indulsit.

46 Historiæ duplicem habent usum, qui nostri sit argumenti: nam et exempla suppeditant et judicia. Exempla quo meliorum sunt populorum ac populorum, eo plus habent auc-

σοιτε εἶν. τῆς δὲ ὀργῆς τὸ μὲν δραστήριον εὐκλεές· τὸ δὲ ὑπέρομετρον φευκτὸν καὶ ἀσύμφορον. Ex animi motibus illi omnino simpliciterque arripiendi, in quibus id, quod officio convenit eligique dignum est, purum reperitur atque sincerum. At quibus accidit, ut et in ma-

lum vergant atque declinent, his non omnimode utendum, sed quatenus conducunt. Prudentia bono est merum et incorruptum, quod nemo negaverit. In ira id, quod actuosum, laudabile: quod modum excedit, vitandum, ut damnum adferens. (Cap. 7.)

aimed at. Thus for instance, we cannot love God too much; for superstition does not err in this, that it loves God too much; but that its love acts perversely. We cannot desire eternal happiness too much, nor fear eternal misery too much, nor hate sin too much. It is therefore truly said by Gellius, that there are some things of which the range is not to be bounded by any limits; such that the larger and fuller they are, the more praiseworthy are they. So Lactantius, after discoursing much concerning the affections, says, *The procedure of wisdom is not shewn in moderating them, but their causes; since they arise from external incitements: nor are we to make it our business to restrain such affections, since they may be feeble in the greatest crimes, and vehement without any crime.* It is our purpose to place Aristotle very high, but with the same liberty which he allowed himself, with reference to his own master, actuated by his love of truth.

46 Passages of history are of twofold use to us; they supply both examples of our arguments, and judgment upon them with regard to examples; in proportion as they belong to better times and better nations, they have the more authority; and therefore we have preferred those taken from the Greeks and the Romans. Nor are

toritatis: ideo Græca et Romana vetera ceteris prætulimus. Nec spernenda judicia, præsertim consentientia: jus enim naturæ, ut diximus, aliquo modo inde probatur; jus vero gentium non est ut aliter probetur.

*Poetæ.  
Oratores.*

47 Poetarum et oratorum sententiæ non tantum habent pondus: et nos sæpe iis utimur non tam ut inde adstruamus fidem, quam ut his quæ dicere voluimus ab ipsorum dictis aliquid ornamentum accedat.

*II. Libri sacri.  
I. Testam. vetus.*

48 Librorum, quos a Deo afflati homines aut scripserunt, aut probarunt, auctoritate sæpe utor, cum discrimine antiquæ et novæ legis. Antiquam legem sunt qui urgent pro ipso jure naturæ: haud dubie mendose; multa enim ejus veniunt ex Dei voluntate libera, quæ tamen cum vero jure naturæ nunquam pugnat: et eatenus argumentum inde rectè ducitur, dummodo distinguamus accurate jus Dei, quod Deus per homines interdum exsequitur, et jus hominum inter se. Vitavimus ergo, quantum potuimus, et hunc errorem, et alterum ei contrarium, qui post novi federis tempora nullum antiqui federis usum esse putat. Nos contra censemus, tum ob id

---

the judgments delivered in such histories to be despised, especially when many of them agree: for Natural Law, as we have said, is in a certain measure, to be proved by such consent; and as to the Law of Nations, there is no other way of proving it.

47 The opinions of poets and orators have not so much weight; and these we often use, not so much in order to claim assent to what they say, as that we may give to what we say something of ornament from their modes of expression.

48 The books written by men inspired by God, or approved by them, I often use as authority, with a distinction between the Old and the New Law. There are writers who allege the Old Law as a proof of the Law of Nature; but undoubtedly, without sufficient reason; for many parts of that Law proceed from the free will of God; which, however, is never at variance with the true Law of Nature: and so far, an argument may rightly be drawn from it; provided we distinguish accurately the Command and Will of God, which God sometimes executes by means of men, and the Rights of men towards one another. We have therefore shunned, as far as we could, both that error, and the error contrary to that, of those who think that, after the promulgation of the New Covenant, there is no longer any use for the old one. We hold the contrary; both for the reasons which we have now alleged; and because the nature of the New Covenant is such, that with relation to the precepts which are

quod jam diximus, tum quia novi federis ea est natura, ut quæ ad virtutes morum pertinentia præcipiuntur in veteri federe, eadem et ipsum aut majora præcipiat: et hunc in modum usos testimoniis antiqui federis videmus antiquos Christianorum scriptores.

49 Ad percipiendam autem librorum ad antiquum fedus pertinentium sententiam, non parum conferre nobis possunt <sup>Hebræi scriptores.</sup> Hebræi scriptores, ii maxime qui et sermones, et mores patrios habuerunt percognita.

50 Novo federe in hoc utor, ut doceam, quod non aliunde disci potest, quid Christianis liceat: quod ipsum tamen, contra quam plerique faciunt, a jure naturæ distinxi: pro certo habens in illa sanctissima lege majorem nobis sanctimoniam præcipi, quam solum per se jus naturæ exigat. Neque tamen omisi notare, si qua sunt quæ nobis commendantur magis quam præcipiuntur<sup>7</sup>, ut a præceptis declinare sciamus nefas et pænæ obnoxium, ad summa quæque contendere generosi esse consilii, et sua non carituri mercede.

51 Synodici canones qui recti sunt, collectiones sunt ex <sup>3. Synodorum canones.</sup>

<sup>h</sup> Hebræi scriptores] Ita sensit Cas-  
sianus *Institutione Divinarum Scriptu-  
rarum.*

<sup>7</sup> Vide, quæ monebimus infra, ad  
Lib. i. c. 2. § 9. num. 4. *J. B.*

given in the Old Testament pertaining to the moral virtues, the New Testament commands the same, or greater virtues of the same kind; and we see that the ancient Christian writers have used the testimony of the Old Covenant in this manner.

49 But in order to see what is the knowledge which the books of the Old Testament contain, the Hebrew writers may help us no little; and especially those who were best acquainted with the discourses and manners of their countrymen.

50 I use the New Testament for this purpose; that I may shew, what cannot be shewn in any other way, what is lawful for Christians; which however, contrary to what most writers have done, I have distinguished from the Law of Nature: holding it for certain that in that more holy Law, a greater holiness is enjoined upon us than the Law of Nature of itself requires. Nor have I omitted to note, where there are matters which are rather recommended to us than commanded; that we may understand that to deviate from the commands is wicked, and makes us liable to punishment: to aim at the highest excellence, is the work of a nobler and more generous spirit, which will not want its reward.

51 The Synodical Canons which are authentic, are collections

generalibus legis divinæ pronuntiatis, ad ea, quæ occurrunt, aptatæ; hi quoque aut monstrant, quod divina lex præcipit, aut ad id, quod Deus suadet, hortantur. Et hoc vere ecclesiæ Christianæ est officium, ea quæ sibi a Deo tradita sunt tradere et eo quo tradita sunt modo. Sed et mores apud Christianos illos veteres, et qui tanti nominis mensuram implebant, recepti, aut laudati, merito pro canonibus valent<sup>a</sup>. Secunda post hos auctoritas est eorum qui suis quique temporibus pietatis et doctrinæ fama inter Christianos floruerunt, neque gravis cujusquam erroris notati sunt: nam et hi quæ dicunt magna cum asseveratione, et quasi comperta, momentum non exiguum habere debent, ad interpretanda quæ obscura videntur in sacris literis; eoque majus, quo et plurium apparet consensus, et propius acceditur ad primæ puritatis tempora, cum nec dominatus adhuc nec coitio ulla primitivam veritatem adulterare potuit.

4. Christianorum primum usus, mores.

5. Patrum et scripta, et consensus.

6. Scholastici DD.

52 Qui his successerunt Scholastici, quantum ingenio

<sup>a</sup> Multum abesse, ut tantum subsidii, quantum putat Auctor noster, ad hanc disciplinam excolendam, inde peti queat, paucis ostendimus in Notis Gallicis. De Patribus Ecclesiæ ex professo

egimus in Præfatione nostra ad PUFENDORFIUM *De Jure Nat. et Gent.* § 9, et 10. alterius Editionis: et forte aliquando Opere singulari, quæ ibi diximus, nos plenius exposituros, ac vindicatu-

from the general precepts of the Divine Law, adapted to special occurrences. And these either shew what the Divine Law commands, or exhort us to that which God enjoins. And this is the office of a truly Christian Church: to deliver to Christians the precepts which God has delivered to it, and in the manner in which God has delivered them.

Also the customs which were received or commanded among those ancient Christians who were truly worthy of that great name, may, with reason, have the force of Canons.

Next to these, is the authority of those who, each in his own time flourished among the Christians, with the reputation of piety and learning, and who were never charged with gross error. What these assert with great positiveness, as matters of which they are convinced, must be allowed to have no small weight in the interpretation of what is obscure in the sacred writings: and this the more, in proportion as we have the assent of a greater number, and as they approach nearer to the times of original purity, when neither the domination of one, nor the combination of several, had operated to adulterate primitive truth.

52 The Schoolmen, who succeeded them, often shew no ordinary powers of intellect; but they fell upon evil times, ignorant of

valeant, sæpe ostendunt: sed in infelici et artium bonarum ignara sæcula inciderunt: quo minus mirum si inter multa laudanda, aliqua et condonanda sunt. Tamen ubi in re morum consentiunt, vix est, ut errent: quippe perspicaces admodum ad ea videnda, quæ in aliorum dictis reprehendi possunt: in quo ipso tamen diversa tuendi studio laudabile præbent modestiæ exemplum, rationibus inter se certantes, non, qui mos nuper adeo literas inquinare cœpit, convitiis, turpi fœtu impotentis animi.

53 Juris Romani scientiam profitentium tria sunt genera. III. Jure consulti.  
Primum eorum est, quorum opera in Pandecte, Codicibus Theodosiano et Justiniano, et in Novellis constitutionibus apparent. Secundum eos habet; qui Irnerio successerunt, Accursium, Bartolum, et tot alia nomina, quos penes diu fori regnum fuit. Tertium eos complectitur, qui humaniores literas I. Antiqui. cum legum studio conjunxerunt. Primis multum defero: nam et rationes sæpe optimas suppeditant ad demonstrandum id,

ros ab insultibus Monachi cujusdam, qui nuperrime Veterum illorum Doctorum per fas et nefas se *ὑπερασπιστήν* professus erat, jam tum significabamus, quando recensionem hanc Operis Gro-

tiani primum edidimus. [J. B. 1720.] Nec vana fuit promissio: quum exinde, anno 1728: prodierit Liber, Gallice scriptus, *De Doctrina Morali Patrum*, ubi fuse rem exsequuti sumus. J. B.

good literature; and therefore it is the less wonderful, if, among many things which merit praise, there are some which need excuse. Yet when they agree in points of morals, they are not likely to be wrong: since they are very clearsighted in discerning what may be found fault with in the doctrines of others: while, in their mode of maintaining opposite sides of a question, they afford a laudable example of moderation; contending against each other with arguments; and not, as the custom has been of late, to the dishonour of learning, with railing and abuse, the foul offspring of ill-regulated minds.

53 Of the teachers of the Roman Law, there are three kinds: the first, those whose works appear in the Pandects, the Codex of Theodosius, and that of Justinian, and the laws called Novells. The second class contains those who succeeded Irnerius; namely Accursius, Bartolus, and so many others, who have long borne supreme sway in the Courts of Law. The third class includes those who have combined the study of elegant literature with the study of the law. For the first I have great deference; for they often supply the best reasons to prove what belongs to the nature of Jus; and give their testimony both to Natural Law and to the Law of Nations: yet

quod juris est naturæ: et eidem juri neque minus gentium juri testimonium sæpe præbent, sic tamen ut ipsi non minus quam alii nomina hæc sæpe misceant, imo et jus gentium sæpe vocent id, quod quorundam duntaxat populorum est, nec tanquam ex condicto, sed quod alii aliorum imitatione, aut fortuito receperunt. Sed et quæ vere juris sunt gentium, sæpe tractant promiscue et indiscrete cum his, quæ juris sunt Romani, ut ex titulo de captivis et postliminio apparet. Hæc ergo ut discernerentur, laboravimus.

2. *Medii.*

54 Secunda classis juris divini et historiæ veteris incuriosa, omnes regum populorumque controversias definire voluit ex legibus Romanis, assumtis interdum canonibus. Sed his quoque temporum suorum infelicitas impedimento sæpe fuit, quo minus recte leges illas intelligerent, satis sollertes alioqui ad indagandam æqui bonique naturam: quo factum, ut sæpe optimi sint condendi juris auctores, etiam tunc cum conditi juris mali sunt interpretes. Audiendi vero tum maxime, cum tali consuetudini, quæ nostrorum temporum jus gentium facit, testimonium perhibent.

3. *Recentiores.*

55 Tertii ordinis magistri, qui Romani juris finibus se

---

in such a way that they, no less than others, often confound these provinces: indeed they often call that *Jus Gentium*, the Law of Nations, which is only the law of certain peoples; and that, not even by consent, but what one nation has received by imitation of another, or by accident. Also what truly belongs to *Jus Gentium* they often treat promiscuously and indiscriminately with points which belong to the Roman Law; as appears in the titles concerning Captives, and Postliminium. We have endeavoured to keep these subjects distinct.

54 The second of these classes, regardless of divine law and of ancient history, attempted to define all the controversies of kings and peoples on the grounds of the Roman Law, sometimes taking into account the Canons. But these writers, too, were prevented, by the unhappiness of their times, from understanding those laws rightly; being, in other respects, sufficiently intelligent in investigating the nature of right and equity: whence it comes to pass, that they, while they are good authorities for making new laws, are bad interpreters of laws already made. They are to be listened to with most attention, when they give their testimony to such customs as make the Law of Nations in our time.

55 The masters of the third class, who include themselves within the limits of the Roman Law, and either never, or in a very slight

includunt, et in jus illud commune aut nunquam, aut non nisi leviter exspatiantur, vix ullum habent usum qui nostri sit argumenti. Scholasticam subtilitatem cum legum et canonum cognitione conjunxerunt, ita ut a controversiis etiam populorum ac regum non abstinerent Hispani duo Covarruvias et Vasquius: hic magna libertate, modestius alter, nec sine exacto quodam judicio. Historias magis eidem legum studio inserere aggressi sunt Galli: quos inter magnum obtinent nomen Bodinus et Hotomanus, ille perpetuo opere, hic sparsis quæstionibus, quorum et pronuntiata et rationes sæpe nobis inquirendi veri suppeditabunt materiam.

56 In toto opere tria maxime mihi proposui: ut definiendi rationes redderem quam maxime evidentes, et ut quæ erant tractanda, ordine certo disponerem, et ut quæ eadem inter se videri poterant nec erant, perspicue distinguerem.

VII.  
*Instituti et ordinis in universorum consilium et ratio explicata.*

57 Temperavi me ab his, quæ alterius sunt tractationis, ut quæ docent quid ex usu sit facere: quia ista suam habent artem specialem politicam, quam recte ita solam tractat Aristoteles, ut alieni nihil admisceat, contra quam fecit Bodinus, apud quem hæc ars cum juris nostri arte confunditur. Non-

---

degree, travel into that common or Natural Law, have scarcely any use in referencé to our argument. They join the subtilty of the schoolmen with a knowledge of the laws and canons; so that two of them, Spaniards, Covarruvias and Vasquius, did not abstain from the controversies even of peoples and of kings: the latter, very freely; the former, more modestly, and not without shewing some exactness of judgment. The French have introduced the practice of connecting history more with the study of the law: among whom Bodin and Hotoman have a great name: the former, in the general scheme of his work; the latter, in questions scattered through the progress of his. Both the opinions and the arguments of these writers will often require our consideration, and will supply us with materials for truths.

56 In the whole course of my work I have had in view these things especially: to make my definitions and reasons as clear as I could: to arrange in due order the matters I had to treat of: and to distinguish clearly things which were really different, though they seemed identical.

57 I have refrained from discussing points which belong to another subject; as the Utility of this or that course; for these belong to a special Art, namely, the Art Political; which Aristotle rightly treats as a separate subject, mixing with it nothing of any other kind;

nullis tamen locis ejus quod utile est feci mentionem, sed obiter, et ut id ipsum a justis quæstione apertius distinguerem.

58 Injuriam mihi faciet, si quis me ad ullas nostri seculi controversias, aut natas, aut quæ nascituræ prævideri possunt, respexisse arbitratur. Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in jure tractando ab omni singulari facto abduxisse animum.

*Dicendi  
genus concisum.*

59 Dicendi genus quod attinet, nolui ad rerum tractandarum multitudinem adjungendo verborum copiam fastidium parere lectori, cujus utilitatibus consulebam. Itaque secutus sum quantum potui concisum et docenti conveniens loquendi genus: ut tanquam in uno conspectu habeant, qui negotia publica tractant, et quæ incidere solent controversiarum genera, et principia unde dijudicari possunt: quibus cognitum facile erit ad rem subjectam accommodare orationem et quantum lubet extendere.

---

thus differing from Bodinus, in whom this Art is confounded with *Jus* in our sense. In some cases, however, I have made mention of the Utility of acts; but collaterally only, and in order to distinguish that question the more plainly from the question of Right.

58 The reader will do me injustice, if he judges me to have written with a regard to any controversies of our own time; either such as already exist, or such as can be foreseen as likely to arise. I profess, in all sincerity, that, as mathematicians consider their figures as abstracted from body, so did I, in treating of Rights, abstract my mind from every particular fact.

59 As to the style, I was unwilling, by adding prolixity of language to the multitude of the matters treated of, to weary the reader whom I wished to benefit. I therefore have followed a concise and didactic mode of treatment: that they who have to manage public affairs, may see, at one view, the kinds of controversies which are wont to arise, and the principles by which they are to be decided: this being known, it will be easy to accommodate their own discourses to the subject, and to expand the discussion as much as they please.

60 I have adduced the words of the authors themselves, when they were such as either carried with them authority, or exhibited especial elegance: and this I have sometimes done in Greek authors; but mostly, when either the quotation was short, or one of which I despaired of imitating the grace in a Latin translation: such a translation I have however added in every instance, for the benefit of those who find the Greek difficult.



60 Scriptorum veterum ipsa verba adduxi interdum, ubi Scriptorum  
verba ipsa. talia erant, ut aut cum auctoritate, aut cum venustate singulari dicta viderentur: quod et in græcis feci nonnunquam, sed maxime ubi aut brevis erat sententia, aut cujus gratiam sperare non audebam latino sermone me posse assequi: quem tamen ubique adjunxi in eorum commodum qui græca non didicerunt.

61 Quam vero ego in aliorum sententiis ac scriptis dijudicandis mihi sumsi libertatem, eandem sibi in me sumant, Libertas ju-  
dicii lectori  
relicta. omnes eos oro atque obtestor, quorum in manus ista venient. Non illi promptius me monebunt errantem, quam ego monentes sequar. Et jam nunc adeo, si quid hic pietati, si quid bonis moribus, si quid sacris literis, si quid ecclesiæ Christianæ consensui, si quid ulli veritati dissentaneum a me dictum est, id nec dictum esto.

---

61 I beg all readers into whose hands my work may come, to take the same liberty in judging of my opinions and expressions which I have taken with regard to those of others. They cannot be more ready to admonish me when I am in error, than I shall be to attend to their admonition.

And now, if I have said anything which is at variance with sound piety, with good morals, with holy scripture, with the unity of the Christian Church, with truth in any form;—let that be as unsaid.

---



HUGONIS GROTII  
DE JURE BELLI AC PACIS.  
LIBER PRIMUS.

CAPUT I.

QUID BELLUM, QUID JUS.

- |   |   |
|---|---|
| <p>I. <i>Ordo operis.</i></p> <p>II. <i>Belli definitio, et origo nominis.</i></p> <p>III. <i>Jus pro attributo actionis describitur, et dividitur in Rectorium et Æquatorium.</i></p> <p>IV. <i>Jus pro qualitate dividitur in facultatem et aptitudinem.</i></p> <p>V. <i>Facultatis sive juris strictæ dicti divisio in potestatem, dominium, creditum.</i></p> <p>VI. <i>Facultatis alia divisio: in vulgarem et eminentem.</i></p> <p>VII. <i>Aptitudo quid?</i></p> <p>VIII. <i>De justitiâ expletrice et attributricis: easque propriæ non distingui per proportionem Geometricam et Arithmeticam: nec quod hæc circa res communes, illa circa res singulorum versetur.</i></p> <p>IX. <i>Jus pro regula definitur, et dividitur in naturale et voluntarium.</i></p> | <p>X. <i>Juris naturalis definitio, divisio, et distinctio ab his quæ non propriè sic dicuntur.</i></p> <p>XI. <i>Instinctum cum aliis animalibus communem, aut proprium hominibus, non facere aliam juris speciem.</i></p> <p>XII. <i>Quomodo probetur jus naturale.</i></p> <p>XIII. <i>Juris voluntarii divisio in humanum et divinum.</i></p> <p>XIV. <i>Jus humanum dividitur in civile, civili arctius, et civili latius, quod est jus Gentium: ejus explicatio, et quomodo probetur.</i></p> <p>XV. <i>Jus divinum dividitur in universale et unius populi proprium.</i></p> <p>XVI. <i>Jure Hebræorum nunquam obligatos fuisse alienigenas.</i></p> <p>XVII. <i>Quæ argumenta Christiani petere possint ex lege Hebræa, et quomodo.</i></p> |
|---|---|

I. **C**ONTROVERSIÆ eorum quos nulla juris civilis tenet communio, quales sunt et qui in gentem nondum coierunt, et qui inter se diversarum sunt gentium, tum

---

CHAPTER I. *What is War; What are Rights?*

I. [Questions of Rights among citizens of the same State are settled by the instituted Law of the State; and therefore do not belong to our subject, which is, Rights by nature, not Rights by institution.]

Between persons who are not bound by a common instituted Right, as those who have not yet formed a State; or between those

<sup>1</sup>privati, tum Reges ipsi, quique per Regibus jus obtinent, sive illi optimates sunt, sive populi liberi, aut ad belli, aut ad pacis tempora pertinent. Sed quia bellum pacis causa suscipitur, et nulla est controversia unde non bellum oriri possit, occasione bellici juris, quæcunque tales incidere solent controversiæ, recte tractabuntur: ipsum deinde nos bellum ad pacem, ut finem suum, deducet.

II. 1 De Belli ergo jure acturi, videndum habemus, quid bellum sit, de quo quæritur: quid jus, quod quæritur. Cicero dixit Bellum certationem per vim. Sed usus obtinuit, ut <sup>a</sup>non actio, sed status eo nomine indicetur, ita ut sit Bellum status per vim certantium, qua tales sunt: quæ generalitas omnia illa bellorum genera comprehendit, de quibus agendum deinceps erit: neque enim privatum hic excludo, ut quod reipsa prius sit publico, et haud dubie cum publico communem habeat naturam, quæ propterea uno eoque proprio nomine signanda est.

<sup>1</sup> Scilicet ubi in loco, qui nullius est, aliquid negotii inter se habent. Vide infra, II. 11. § 5. n. 3. J. B.

<sup>a</sup> Non actio, sed status] Philo, II. De Legibus Specialibus [p. 790]: ὥσπερ γὰρ οἶμαι πολεμίου οὐ μόνου τοῦ ἤδη ναυμαχοῦντος ἢ πεζομαχοῦντος νομιστέον, ἀλλὰ καὶ τοὺς εἰς ἐκέρων παρεσκευασμένους, καὶ τὰς ἐλεπόλεις ἐφιστάνας τοῖς λιμέσι καὶ τείχεσι, κἄν μὴ συμπλέκωνται, κρί-

νομεν. Hostes non soli existimantur, qui jam navali aut terrestri prælio certant, sed pro talibus habendi et qui machinas admovent portubus aut mœnibus, etiamsi nondum pugnam incipiunt. Servius ad illud primæ Æneidos, [v. 545]

nec bello major et armis.

Bellum et consilium habet: arma tantum in actu ipso sunt. Idem ad VIII. [v. 547] Bellum est tempus omne,

who belong to different States—whether private persons, or kings, or those whose mutual Rights [and Obligations] resemble those of kings, such as Rulers of peoples, or free Peoples themselves—questions of Rights pertain either to time of war or time of peace. But war is undertaken for the sake of peace; and, on the other hand, there is no question of Rights which may not issue in war: hence we shall begin by Rights in war, or, as they are termed, Rights of War: and the consideration of War will lead us to the consideration of Peace, the end of war.

II. 1 We have then to treat of War, and of the Rights of War. We must then ask, What is War? What are Rights?

Cicero says that War is a contest or contention carried on by force. But usage applies the term, not to an action, [a contest,] but to a state or condition: and thus we may say, War is the state of persons contending by force, as such.

2 Neque hujus nominis origo repugnat; est enim bellum ex voce veteri duellum, ut duonus quod fuerat factum est bonus, et duis bis. Duellum autem a duobus dictum simili sensu, quo pacem unitatem dicimus. Sic Græcis ex multitudinis significatione πόλεμος: veteribus etiam λύη a dissolutione, quomodo et corporis dissolutio <sup>2</sup>δύη.

[Cicero Orat. c. xiv; Quint. II. Inst. Orat. l. 4.]

3 Neque usus <sup>3</sup>vocis laxiorem hanc notionem repudiat. Quod si quando belli nomen publico tantum tribuitur, nihil id nobis obstat, cum certissimum sit, nomen generis sæpe speciei, præsertim excellentiori, peculiariter adhærescere. Justitiam in definitione non includo, quia hoc ipsum in hac disputatione quærimus, sitne aliquod bellum justum, et quod bellum justum sit. Distingui autem debet id, quod quæritur, ab eo de quo quæritur.

III. 1 De jure belli cum inscribimus hanc tractationem, primum hoc ipsum intelligimus, quod dictum jam est, sitne bellum aliquod justum, et deinde quid inb ello justum

*quo vel preparatur aliquid pugnae necessarium, vel quo pugna geritur. Prælium autem dicitur confictus ipse bellorum.*

<sup>2</sup> Vid. e. g. Horat. Sat. 1. 3. 107; Terent. Eum. Act. 1. Sc. 1. v. 16. J. B.

<sup>3</sup> Ita habent omnes Edd. et nihil mutandum. In animo habuit etymologiam vocis λύη a ΠΛΑΤΩΝΕ traditam, ἀπὸ τῆς διαλύσεως τοῦ σώματος, ἣν ἐν τούτῳ τῷ πάθει ἴσχει τὸ σῶμα. In

Cratyl. p. 419. Ad hoc exemplum, τὸ δύη, quod inter alia, per λύη exponitur, Auctor noster, veteris Philosophiæ placitis innutritus, secundum quam Dolor est solutio continui, ἀπὸ τοῦ δύω deduxit: dissolutionem partium corporis ita opponens dissolutioni seu dissidio animorum, quod innuit vox λύη, nullibi, quod quidem sciam, alio sensu usurpata. J. B.

Hence we do not exclude *private*\* wars, which preceded public wars, and have the same origin as those.

2 The name, (*Bellum*,) comes from an old word *Duellum*, and implies the separation of two, (*duo*;) as peace is *unity*, when two are made one. So the Greek πόλεμος from πολὺς, *many*.

3 The common use of the word *War* allows us to include *Private War*, though, used generally, it often means specifically *public War*.

We do not say that war is a state of *just* contention, because precisely the point to be examined is, Whether there be just war, and What war is just. And therefore we must distinguish the subject, *War*, from the question which we examine concerning it.

III. 1 By entitling our Treatise, *Of the Rights of War*, we

\* In including *private*, and excluding *just*, in his definition of war, G. seems to have in view the definition of Albericus Gentilis; "Bellum est contentio, publica,

sit? Nam jus hic nihil aliud quam quod justum est significat, idque negante magis sensu quam aiente, ut jus sit quod injustum non est. Est autem injustum, quod naturæ societatis ratione utentium repugnat. Sic alteri detrahere sui commodi causa, contra naturam esse dicit Cicero, atque ita probat, quia si id fiat, societas hominum et communitas evertatur necesse sit. Hominem homini insidiari nefas esse, evincit Florentinus, quia cognationem quandam inter nos constituerit natura. Seneca: *ut omnia inter se membra consentiunt, quia singula servari totius interest; ita homines singulis parcent, quia ad cœtum geniti sumus.* <sup>b</sup> *Salva enim esse societas nisi amore et custodia partium non potest.*

2 Sicut autem societas <sup>c</sup> alia est sine inæqualitate, ut inter fratres, cives, amicos, fœderatos: alia inæqualis, καθ' ὑπεροχὴν Aristoteli, ut inter patrem et liberos, dominum et servum, regem et subditos, <sup>d</sup> Deum et homines: ita justum aliud est ex æquo inter se viventium, aliud ejus qui regit et

*De Officiis,*  
lib. 3.

*L. ut vim 3.*  
*D. de Just. et*  
*Jur.*  
*De Ira. li.*  
31.

*Ethic. Nic.*  
viii. 8.

<sup>b</sup> *Salva enim esse societas nisi amore et custodia partium non potest* Seneca idem ep. xviii: *Hæc societas diligenter et sancte dolenda est, quæ nos omnes omnibus miscet, et judicat aliquid esse commune jus generis humani. Videri potest hac de re Chrysostomus, 1 Cor.*

xi. 1. [Tom. III. p. 405, 406.]

<sup>c</sup> *Alia est sine inæqualitate* Ut in Grammaticis alia constructio convenientiæ, alia regiminis.

<sup>d</sup> *Deum et homines* De hac societate vide Philonem in ἐξένησε Νώε (pag. 281, 282. *Ed. Paris.*) Habet et Plutar-

mean, in the first place, to imply the discussion of the questions just stated, Whether any war is just, and What is just in war. For *Rights, Jus*, in this case, means only what is right, that is, just; and that, rather with a negative than a positive sense; so that *that* comes within the substantive *Right*, which is not unjust, or wrong.

That is unjust which is contrary to the nature of a society of rational creatures. Cicero, Seneca, Florentinus, reason on the ground of man being intended by nature for society. [See the quotations.]

2 Society is either that of equals, as brothers, friends, allies; or it is unequal, as that of parent and child, master and servant, king and subjects, God and men: and what is just, is different in the two cases. We may call them respectively Equatorial Rights and Rectorial Rights.

IV. *Jus, Right*, has another signification, derived from the former, as when we say *my Right*. In this sense *Right* is a moral Quality by

armata, justa." For reasons for preferring the latter definition, see *Elements of Morality*, Art. 1068. The rights of War, as understood in modern times, exclude private wars, or wars among subjects, and include the *assertion* of justice. If they did not, there would be no question of *Rights*. W. W.

qui regitur, qua tales sunt: quorum hoc jus Rectorium, illud Æquatorium recte, ni fallor, vocabimus.

IV. Ab hac juris significatione diversa est altera, <sup>4</sup>sed ab hac ipsa veniens, quæ ad personam refertur: quo sensu jus est Qualitas moralis personæ competens ad aliquid juste habendum vel agendum. Personæ competit hoc jus, etiamsi rem interdum sequatur, ut servitutes prædiorum, quæ jura realia dicuntur, comparatione facta ad alia mere personalia; non quia non ipsa quoque personæ competant, sed quia non alii competunt, quam qui rem certam habeat. Qualitas autem moralis perfecta, facultas nobis dicitur; minus perfecta, aptitudo: quibus respondent in naturalibus, illi quidem actus, huic autem potentia.

V. Facultatem Jurisconsulti nomine sui appellant, nos posthac jus proprie aut stricte dictum appellabimus: sub quo continentur potestas, tum in se, <sup>6</sup>quæ libertas dicitur, tum in alios; ut patria, dominica: <sup>1</sup>Dominium, <sup>5</sup>plenum sive minus

chus quedam in Numa [pag. 62. Potuisset Auctor addere locum Ciceronis longe inculentiozem et aptiozem, quem reperies *De Legib.* Lib. 1. cap. 7, *J. B.*]

<sup>4</sup> Confer PUFENDORF. *De Jur. Nat. et Gent.* Lib. 1. cap. 1, § 19, 20. *J. B.*

<sup>6</sup> *Quæ libertas dicitur*] Quam prop-

terea facultatis nomine optime definiunt Romani Jurisconsulti.

<sup>1</sup> *Dominium*] *Jus pro Dominio*, Scholiastes ad Horatium. [Vid. II. Ep. 2. 174. et II. Sat. 3. 217. *J. B.*]

<sup>5</sup> Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. 4, § 2. *J. B.*

which a person is competent to have or to do a certain thing justly.

Right in this sense belongs to a person, though sometimes it follows a thing: as one piece of land may have a right of way, or other easement, over another piece of land. In this case the Right still belongs to a person, namely, to the person who possesses the first piece. Such Rights are called *real* Rights in comparison with others which are merely personal.

This moral quality, when perfect, is called *facultas*, a jural claim; when less perfect, *aptitudo*, a fitness, or moral claim.

V. A Jural Claim, belonging to any one, the jurists call *sum*, his own thing. We shall call this hereafter a *Right* strictly speaking, or a *Right proper*.

It includes, Power; whether over one's self, which is Liberty;

or over another, which is Authority, for example, paternal, dominical (that of a master over a servant;)

Ownership; whether full, as of Property;

or less full, as of Compact, Pledge, Credit, to which corresponds Debt on the other side.

pleno, ut ususfructus, jus pignoris: et creditum, <sup>c</sup>cui ex ad-  
verso respondet debitum.

VI. Sed hæc facultas rursum duplex est: vulgaris scilicet, quæ usus particularis causa comparata est; et eminent, quæ superior est jure vulgari, utpote communitati competens in partes et res partium, boni communis causa. Sic regia potestas sub se habet et patriam et dominicam potestatem: sic <sup>e</sup>in res singulorum majus est dominium Regis ad bonum commune, quam dominorum singularium: sic reipublicæ quisque ad usus publicos magis obligatur, quam creditori.

Nicom Lib. v.  
cap. vi.

VII. Aptitudinem vero <sup>b</sup>ἀξίαν, id est dignitatem vocat Aristoteles. Michaël Ephesius, id quod secundum eam æquale dicitur, interpretatur τὸ προσαρμόζον et τὸ πρέπον, id quod convenit.

VIII. 1 Facultatem respicit justitia expletrix, quæ proprie aut stricte justitiæ nomen obtinet, συναλλακτικὴ Aristo-

<sup>c</sup> Voces *Creditum* et *Debitum*, non tantum spectant, ex mente auctoris, id quod ex qualibet causa, etiam ex delicto, debetur, *L. 11. 12. D. De verb. et rerum signif.* (vid. infr. Lib. II. cap. 4, § 2, et cap. 17, § 1). Sed etiam *jus puniendi*, et *obligationem ad penam*, hæc complectuntur. Vid. *Prolegom.* § 8. in *fin.* et *Lib. III. cap. 13. § 1, 2. J. B.*

<sup>e</sup> *In res singulorum majus est dominium regis* Philo, περί φηγουργίας. [p. 222.] καὶ μὲν ἀργυρὸς τε καὶ χρυσὸς καὶ ὅσα ἄλλα κειμήλια παρὰ τοῖς ἀρχομένοις θησαυροφυλακεῖται, τῶν ἡγουμένων μᾶλλον ἢ τῶν

ἔχόντων ἐστίν. Certe argentum, aurum, et quæ pretiosa alia apud subditos custodiuntur, eorum qui regnant magis sunt quam possidentium. Plinius, *Panegyrico* [c. p. 27]: *cujus est quidquid est omnium, tantum ipse, quantum omnes, habet.* Et mox: *Ecquid Cesar non suum videat?* [cap. 50. qui locus tamen male adfertur et aptatur. *J. B.*] Adde *Sarisberniensem, in Policratico*, Lib. VI. c. i. [p. 335.]

<sup>b</sup> Ἀξίαν] Cicero, *de Officiis*, I. [cap. 17]: *Sed si contentio quedam et comparatio fiat, quibus plurimum tribuendum officii, principes sint, patria, et paren-*

VI. But this Right is again twofold: Vulgar, which exists for the purpose of private use; and Eminent, which is superior to vulgar Right, and is the Right which the community has over persons and things for the sake of the common good.

Thus the Royal authority has under it the paternal and dominical. So the power of ownership of the Sovereign over private property for the common good is greater than that of the private owners: so every one is more bound to the state in regard to public uses than to his private creditor.

VII. A Fitness is what Aristotle calls ἀξίαν, a moral claim.

VIII. 1 A Jural Claim, or Right proper, belongs to Expletory Justice, or Justice proper. This is what Aristotle calls *Contractual*



teli, nimis arcto vocabulo, nam ut possessor meæ rei eam mihi reddat, non est ἐκ συναλλάγματος, et tamen ad eandem hanc justitiam pertinet: itaque ἐπανορθωτικὴν idem feliciter dixit. Aptitudinem respicit attributrix, quæ Aristoteli διανεμητικῆ, comes earum virtutum, quæ aliis hominibus utilitatem adferunt, ut liberalitatis, misericordiæ, providentiæ rectoris.

2 Quod vero idem Aristoteles ab expletrice ait respici proportionem simplicem, quam ἀριθμητικὴν vocat; ab attributrice autem comparatam, quam γεωμετρικὴν appellat, quæ sola apud Mathematicos <sup>1</sup>nomen habet proportionis; ex eorum genere est quæ sæpe locum habent, non semper: neque vero per se justitia expletrix ab attributrice differt tali proportionum usu, sed materia circa quam versatur, ut jam diximus. Itaque et contractus societatis expletur proportionem comparata, et si unus tantum aptus inveniatur ad munus publicum, non alia quam simplici commensione attributio fiet.

*tes, quorum beneficiis maxime obligati sumus; proximi liberi, totaque domus, quæ spectat in nos solos, neque aliud ullum potest habere perjugium, deinceps bene convenientes propinqui, quibuscum etiam communis plerumque fortuna est: quamobrem necessaria præsidia vitæ debentur iis maxime, quos ante dixi. Vita autem victusque communis, consilia, sermones, cohortationes, consolationes, interdum etiam oburgationes in amicitia vigent maxime. Vide quæ infra dicentur Lib. II. cap. vii. § 9 et 10. Seneca, De Benef. IV. c. II. ubi de testamentis agit: Quærimus dignissimos, quibus nostra*

*tradamus, ipsum locum vide. Adde Augustinum, De Doctr. Christ. I. c. xxviii, xxix.*

<sup>1</sup> *Nomen habet proportionis* Habitudinis comparisonem vocat Cassiodorus. [Locus exstat in Lib. De Dialectic. pag. 408. In proportionem, inquit, non est similitudo rerum, sed quædam HABITUDINIS COMPARATIO. J. B.] Est hujus proportionis, qua Justitia attributrix uti solet, non incommoda apud Homerum descriptio. [Iliad. XIV. 382].

Ἐσθλὰ μὲν ἰσθλὸν ἴδωκε, χρεῖα δὲ χεῖρον ἕσκεν.

Præstanti dabat hic præstantia, villa VIII.

*Justice; but the term is too narrow; for that the possessor of my thing should restore it to me is not a matter of contract; and yet it belongs to this division. Elsewhere he calls it by a better name, Corrective Justice.*

A Moral Claim [sometimes called an Imperfect Right] belongs to **Attributive Justice**, which Aristotle calls **Distributive Justice**, the companion of the virtues which are useful to our neighbours, as liberality, mercy, directive prudence.

2 Aristotle says that Expletory Justice proceeds by arithmetical proportion, **Attributive**, by geometrical proportion; but this is not always true. The two differ, not in their rules, but in the matter about which they are concerned. A contract of partnership is ruled

3 Neque magis verum est quod a nonnullis dicitur, attributricem versari circa res communes, explettricem circa res singulorum. Contra enim si quis de re sua legare velit, attributrice justitia uti solet: et civitas quæ de communi reddit, quod civium quidam in publicum impenderunt, nonnisi explettricis justitiæ officio fungitur. Recte hoc discrimen notatum a Cyri magistro: nam cum Cyrus puero minori minorem tunicam, sed alienam, attribuisset, et majori contra majorem, docuit eum magister: ὅτι ὁπότε μὲν κατασταθῆι τοῦ ἀρμόττουτος κριτῆς, οὕτω δέοι ποιεῖν. ὁπότε δὲ κρίναι δέοι ὁπότερου ὁ χιτῶν εἶη, τοῦτο σκεπτέον τίς κτῆσις δικαία ἐστὶ πότερα τὸν βία ἀφελόμενον ἔχειν, ἢ τὸν ποιησάμενον ἢ κριάμενον κεκτῆσθαι; *Tunc quidem ubi constitutus esset arbitrator ejus quod cuique conveniret, ita agendum esse; at ubi judicandum esset utrius esset tunica, id spectandum* <sup>k</sup> *utra possessio justior, eumne rem habere qui vi abstulisset, an qui fecisset aut emisset.*

[ap. Xenoph. *Cyrop.* Lib. I. cap. iii. § 14. J. B.]

IX. 1 Est et <sup>l</sup>tertia juris significatio, quæ idem valet

<sup>7</sup> Respicit heic Auctor ad locum Aristotelis, *Ethic. Nicom.* v. 7, de quo in Notis Gallicis egimus, et in eo philosophum non satis recte ratiocinari, ostendimus. J. B.

<sup>k</sup> *Utra possessio justior*] Vide eundem Xenophontem *παιδείας* secundo. Huc spectat lex per Mosem data: non misereberis in judicio pauperis. Exod. xxiii. 3; Levitic. xix. 5. Oportet enim, ut Philo ait, τὰ πρᾶγματα ἀφέλκειν τῆς τῶν δικαζομένων φαντασίας, res abstrahere a litigatorum respectu. [Locus Phi-

lonis legitur in Lib. *de Judiciis*, pag. 720. Apud Xenophontem vero, quod huc faciat, nil reperio, nisi quod videre poteris cap. ii. Libri indicati, § 10, 11. J. B.]

<sup>l</sup> *Tertia juris significatio quæ idem valet quod lex*] Hoc sensu dixit Horatius [1. Sat. iii. 211]:

Jura inventa metu Injusti fateare necesse est. Et alibi: *Jura neget sibi nata.* [Art. Poet. vers. 122]. Ubi scholiastes: *legum sit contentor.*

<sup>8</sup> Vide PUFENDORF. *De Jure Nat.*

by expletory justice, but according to geometrical proportion; if there is only one person fit for an office, it is by attributive justice given to him alone, instead of reckoning proportion.

3 Equally erroneous is what others say, that Attributive Justice concerns things common or public; Expletory, private possessions. For if a man bestow his private property in legacies, he uses attributive justice; and the state, in paying what it owes to private citizens, uses expletory justice\*.

See the story in the *Cyropædia*, in which Cyrus is blamed for giving

\* The remarks in the text go far to prove that the distinction of Contractual, Corrective, or Expletory justice, on the one hand, from Attributive Justice on the other, is not tenable. W. W.

quod lex, quoties vox legis largissime sumitur, ut sit regula actuum moralium obligans ad id quod rectum est. Obligacionem requirimus: nam consilia, <sup>9</sup> et si qua sunt alia præscripta, honesta quidem, sed non obligantia, legis aut juris nomine non veniunt. Permissio autem proprie non actio est legis, <sup>9</sup> sed actionis negatio, nisi quatenus alium ab eo cui permittitur obligat ne impedimentum ponat. Diximus autem, ad rectum obligans, non simpliciter ad justum, quia <sup>m</sup> jus hac notione, non ad solius justitiæ, qualem exposuimus, sed et aliarum virtutum materiam pertinet. Attamen ab hoc jure, quod rectum est, laxius justum dicitur.

2 Juris ita accepti optima partitio est, quæ apud Aristotelem exstat, <sup>1</sup> ut sit aliud jus naturale, aliud voluntarium, quod ille legitimum vocat, legis vocabulo strictius posito: interdum et τὸ ἐν τάξει, constitutum. Idem discrimen apud Hebræos reperire est, <sup>2</sup> qui cum distincte loquuntur, jus naturale vocant <sup>n</sup> מצות, jus constitutum דקין, quorum illud δίκαιώματα, hoc ἐντολὰς solent vertere Hellenistæ.

et Gent. Lib. 1. cap. vi. § 1. J. B.

<sup>9</sup> *Permissionem* non esse meram actionis negationem, a parte Legis, ostendimus ad PUFENDORF. Lib. 1. cap. vi. § 15. Not. 2, et de ea re plenius egimus in Notis Gallicis ad hunc Grotii nostri locum. J. B.

<sup>m</sup> *Jus hac notione, etc.*] Exemplum sit in Zaleuci lege, pœnam irrogante ei qui contra Medici præceptum vinum bibisset. [Habet ex ÆLIANO, Var. Hist. II. 37. Adde Notam Perizonii in III. 34. ejusdem Auctoris. J. B.]

<sup>1</sup> In *Ethic. ad Nicom.* Lib. v. cap. x. Sed utrumque, secundum Philosophum, partem facit *Juris Civilis*, quod vocat Δίκαιον Πολιτικόν, ut ea, de quibus agitur, Δίκαιον Φυσικόν, et Δίκαιον Νομικόν. Adeoque paullo aliter divisio Auctoris nostri sese habet. J. B.

<sup>2</sup> Hoc discrimen non semper observari, ipse auctor fatetur, in Adnotat. ad Luc. i. 6; Vide et Clar. Clericum, in Genes. xxvi. 5. J. B.

<sup>n</sup> מצות] כששׁ כמצות. Sic Maimonides Libro III. ductoris dubitantium cap. xxvi.

the big boy the larger coat, which belonged to the little boy: because his business was expletory, not attributive justice.

IX. 1 *Jus* has a third signification, meaning Law in its largest sense, namely, "a Rule of moral acts obliging to what is right."

"*Obliging*" is necessary to this signification: for mere Counsel or Advice is not included in *Jus* or Law; and Permission is not Law, but the absence of Law, except so far as it obliges other persons not to impede.

"*Obliging to what is right,*" not to what is just; for *Jus* in this signification does not include strict Justice merely, but the matter of other virtues. Yet what is right is sometimes loosely called *just*.

2 The best distinction of Law in this general sense, is that of Aristotle, into Natural Law, and Voluntary or Legal Law [or Positive

X. 1 °Jus naturale est dictatum rectæ rationis, indicans actui alicui, ex ejus convenientia aut disconvenientia cum ipsa natura rationali ac <sup>3</sup>sociali, inesse moralem turpitudinem, aut necessitatem moralem, ac consequenter ab auctore naturæ Deo talem actum aut vetari, aut præcipi.

2 Actus de quibus tale exstat dictatum, debiti sunt aut illiciti per se, <sup>4</sup>atque ideo a Deo necessario præcepti aut vetiti intelliguntur: qua nota distat hoc jus non ab humano tantum jure, sed et a divino voluntario, quod non ea præcipit aut vetat quæ per se ac suapte natura aut debita sunt, aut illicita, sed vetando illicita, præcipiendo debita facit.

3 Ad juris autem naturalis intellectum, notandum est,

° *Jus naturale est dictatum rectæ rationis*] Philo libro, omnem virum bonum esse liberum; Νόμος δὲ ἀψευδῆς ὁ ὀρθὸς λόγος, οὐχ ὑπὸ τοῦ δεινός, ἢ τοῦ δεινός θνητοῦ, φθαρτός, οὐκ ἐν χαρτιδίῳ ἢ στηλαῖς ἀψυχὸς ἀψύχοις, ἀλλ' ὑπ' ἀθανάτου φύσεως, ἀφθαρτος, ἐν ἀθανάτῳ διανοίᾳ τυκθῆναι. *Lex mentiri nescia est recta ratio, quæ lex, non ab hoc aut illo mortali mortalis, non in chartis aut columnis exanimis exanima, sed corrumpi nescia, quippe ab immortalis natura insculpta in immortalis intellectu.* [Pag. 871, B.] Tertullianus de *Corona Militis*: [cap. vi.] *Quæres igitur Dei legem, habens communem istam in publico mundi, in naturalibus tabulis.*

M. Antoninus, Lib. II. τέλος λογικῶν ζώων, τὸ ἔπνεσθαι τῷ τῆς πόλεως καὶ πολιτείας τῆς πρεσβυτάτης λόγῳ καὶ δεσµῷ. [§ 16]. *Finis animantium ratione utentium, sequi legem ac normam civitatis ac reipublice omnium antiquissimæ.* Adde Ciceronis locum de *Republica* III. quem adducit Lactantius VI. 8. Præclara sunt quæ in hanc rem habet Chrysostomus XII, XIII. de statutis. Nec spernenda quæ Thomas Secunda Secunda LVII. 2. et Scotus III. dist. 37.

<sup>3</sup> Voces illas, ac *sociali*, quamquam in omnibus Edd. desint, confidenter addidimus, Auctorem ipsum duces sequuti, qui infra § 12, num. 1. eas habet, et hec a Typographis omissas facile

Law; δίκαιον φυσικὸν and δίκαιον νομικὸν, *Eth. Nicom.* v. 10.] or Instituted Law, τὸ ἐν τάξει. The Hebrew has a like distinction.

X. 1 Natural Law is the Dictate of Right Reason, indicating that any act, from its agreement or disagreement with the rational [and social\*] nature [of man] has in it a moral turpitude or a moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature.

2 Acts concerning which there is such a Dictate are obligatory, [morally necessary,] or are unlawful, in themselves, and are therefore understood as necessarily commanded or forbidden by God; and in this character, Natural Law differs, not only from Human Law, but from Positive Divine Law, which does not forbid or command acts which, in themselves and by their own nature, are either obligatory or

\* Added by Barbeyrac, from what follows XII. 1. See also above, III. 1.

quædam dici ejus juris non proprie, sed ut scholæ loqui amant, reductive, quibus jus naturale non repugnat, sicut justa modo diximus appellari ea quæ injustitia carent: interdum etiam per abusionem ea, quæ ratio honesta, aut oppositis meliora esse indicat, etsi non debita, solent dici juris naturalis.

4 Sciendum præterea, jus naturale non de iis tantum agere quæ citra voluntatem humanam existunt, sed de multis etiam quæ voluntatis humanæ actum consequuntur. Sic dominium, quale nunc in usu est, voluntas humana introduxit: at eo introducto nefas mihi esse id arripere te invito quod tui est domini, ipsum indicat jus naturale; quare <sup>P</sup>furtum naturali jure prohibitum dixit Paulus Jurisconsultus, natura turpe

potuit non animadvertere; ut in aliis locis, ubi res majoris adhuc momenti erat, id ei accidisse, ostendemus. *J. B.*

4 Verum quidem est, Deum non potuisse, salva sapientia sua, actus, qui heic vocantur *debiti*, vetare, aut contrarios præcipere. Attamen vinculum ipsum *Obligationis*, qua quis tenetur illos exerere, ab his abstinere, non ex ipsa natura actum oritur, sed a *voluntate* Dei, quatenus est Auctor naturæ rerum, et summus Hominum Legislator. Adeoque, accurate loquendo, tales actus non possunt dici *per se* debiti, aut illiciti. Qua de re aliquid diximus in Præfatione Gallica ad PUFENDORF. *De Jure Nat. et Gent.* pag. 66, secundæ Edit. et nu-

perime egimus fuse satis in examine *Judicii* illustri LEIBNITZII, subjecto quartæ Editioni versionis nostræ Libelli *De Offic. Hom. et Civ. J. B.*

<sup>P</sup> *Furtum naturali jure prohibitum*] Julianus: ὁ δεύτερος νόμος (post illum de Deo agnoscendo et colendo) *λερὸς φύσει καὶ θεῖος, ὁ τῶν ἀλλοτρίων πάντα μίτη ἐν λόγῳ, μίτη ἐν ἔργῳ, μίτη ἐν αὐταῖς ταῖς λαθρανομίαις τῆς ψυχῆς ἐνεργείαις ταῦτα ἐπιτρέπων συγχεῖν.* [*Orat.* VII. pag. 209. C. D. *Lex altera et ipsa suapte natura sancta atque divina ea est, quæ semper et ubique alienis abstinere jubet, neque vero aut verbo, aut facto, aut arcanis animi*

unlawful; but, by forbidding them makes them unlawful, by commanding them makes them obligatory.

3 In order to understand Natural Law, we must remark that some things are said to be according to Natural Law, which are not so properly, but, as the schools love to speak, reductively, Natural Law not opposing them; as we have said [III. 1] that some things are called just, which are not unjust. And again, by an abuse of expression, some things are said to be according to Natural Law which reason shews to be decent, or better than their opposites, though not obligatory. [As monogamy is better, though we cannot strictly say that polygamy is contrary to Natural Law. Concerning the use of the term *Natural Law*, or *Law of Nature*, in such cases, see *E.* 1054.]

4 It is to be remarked also that Natural Law deals not only with things made by nature herself, but with things produced by

L. I. D. de  
Furtis. L.  
Probrum, 42.  
D. de verb.  
significat.

Ulpianus, Deo displicere Euripides his in Helena versibus :  
(909, et seqq.)

Namque odit ipse vim Deus : nec divites  
Nos esse rapto, sed probe partis cupit.  
Spernenda, si non jure veniat, copia est.  
Communis æther hominibus, tellus quoque,  
In qua ampliare cuique sic fas est domum,  
Ut ab alienis rebus ac vi temperet.

5 Est autem jus naturale adeo immutabile, <sup>5</sup>ut ne a Deo quidem mutari queat. Quanquam enim immensa est Dei potentia, dici tamen quædam possunt, ad quæ se illa non extendit ; quia quæ ita dicuntur, dicuntur tantum, sensum autem qui rem exprimat nullum habent, sed sibi ipsis repugnant. Sicut ergo ut bis duo non sint quatuor ne a Deo quidem potest effici, ita ne hoc quidem, ut quod intrinseca ratione malum est, malum non sit. Et hoc est quod significat Aristoteles, cum dicit *ἕνια εὐθὺς ὠνόμασται συνειλημμένα μετὰ τῆς φαυλότητος*. Nam ut esse rerum postquam sunt et qua sunt aliunde non pendet, ita et proprietates, quæ esse illud necessario consequuntur, talis autem est malitia quorundam actuum, comparatorum ad naturam sana ratione utentem. Itaque et Deus ipse secundum hanc normam de se judicari

*cogitationibus contrarii sint.* Cicero,  
*de Officiis* III. [c. 10] ex Chrysippo : *In*  
*vita sibi quemque petere quod pertineat*

*ad usum, non iniquum est : alteri sur-*  
*ripere, jus non est.*

of man. Thus property, as it now exists, is the result of human will : but being once introduced, Natural Law itself shews that it is unlawful for me to take what is yours against your will. And thus Paulus says that theft is prohibited *naturali jure* ; Ulpian says that it is *naturâ turpe*, bad by nature : Euripides says it is displeasing to God.

5 Natural Law is so immutable that it cannot be changed by God himself. For though the power of God be immense, there are some things to which it does not extend : because if we speak of those things being done, the words are mere words, and have no meaning, being self-contradictory. Thus God himself cannot make twice two not be four ; and in like manner, he cannot make that which is intrinsically bad, not be bad. For as the essence of things, when they exist, and by which they exist, does not depend on anything else, so is it with the properties which follow that essence : and such a property is the baseness of certain actions, when compared with the nature of rational beings. And God himself allows himself to be judged of by

patitur, ut videre est Gen. xviii. 25; Esai. v. 3; Ezech. xviii. 25; Jerem. ii. 9; Mich. vi. 2; Rom. ii. 6, iii. 6.

6 Fit tamen interdum ut in his actibus, de quibus jus naturæ aliquid constituit, imago quædam mutationis fallat incautos, cum revera non jus naturæ mutetur, quod immutabile est, sed res, de qua jus naturæ constituit, quæque mutationem recipit. Exempli gratia: si creditor quod ei debeo acceptum ferat, jam solvere non teneor, non quia jus naturæ desierit præcipere solvendum quod debeo, sed quia quod debbam deberi desiit: ut enim recte in Epicteto Arrianus: *οὐκ ἀρκεῖ τὸ δανείσασθαι πρὸς τὸ ὀφείλειν, ἀλλὰ δεῖ προσεῖναι καὶ τὸ ἐπιμένειν ἐπὶ τοῦ δανείου, καὶ μὴ διαλεῦσθαι αὐτό· non sufficit ut debeatur pecunia datam esse mutuatam, sed oportet ut et maneat adhuc indissoluta mutui obligatio.* Ita si quem Deus occidi præcipiat, si res alicujus auferri, non licitum fiet homicidium aut furtum, quæ voces vitium involvunt, sed non erit homicidium aut furtum, quod vitæ et rerum supremo domino auctore fit.

Lib. 1. Diss.  
c. vii. pag. 34.

7 Sunt et quædam juris naturalis non simpliciter, sed pro certo rerum statu: sic communis rerum usus naturalis fuit, quamdiu dominia introducta non erant; et jus suum per vim consequendi ante positas leges.

<sup>5</sup> Vide PUFENDORF. *De Jure Nat.* et *Genet.* Lib. II. cap. 3. § 5.

<sup>6</sup> Locus est *Ethic. Nic.* Lib. II. cap.

8. Sed tu inspice, et non satis apte hec adferri animadvertes. *J. B.*

this rule. [See the quotations. The passage from Aristotle, *Eth. Nicom.* II. 6, is misapplied, as Barbeyrac observes.]

6 Yet sometimes, in acts directed by Natural Law, there is a seeming of change, which may mislead the unwary; when in fact it is not Natural Law which is changed, but the thing about which that Law is concerned. Thus if a creditor gives me a receipt for my debt, I am no longer bound to pay him; not that Natural Law has ceased to command me to pay what I owe, but because I have ceased to owe it. So if God command any one to be slain or his goods to be taken, this does not make lawful homicide or theft, which words involve crime: but the act will no longer be homicide or theft, being authorized by the supreme Lord of life and of goods.

7 Further; some things are according to Natural Law, not simply, but in a certain state of things. Thus a community in the use of things was natural till property was established; and the right of getting possession of one's own by force existed before instituted law.

XI. 1 Discrimen autem quod in juris Romani libris exstat, ut jus immutabile aliud sit quod animantibus cum homine sit commune, quod arctiori significato vocant jus naturæ; aliud hominum proprium, quod sæpe jus gentium nuncupant, usum vix ullum habet. Nam juris proprie capax non est nisi natura præceptis utens generalibus, quod recte vidit Hesiodus:

*Oper. et Dies.*  
276, et seqq.

Τόνδε γὰρ ἀνθρώποισι νόμον διέταξε Κρονίων·  
Ἰχθύσι γὰρ, καὶ θηροῖσι, καὶ οἰωνοῖσι πεπενηνοῖς,  
Ἐσθήμεν ἀλλήλους· ἐπεὶ οὐ δίκη ἐστὶ μετ' αὐτῶν.  
Ἐνθρώποισι δ' ἔδωκε δίκην, ἣ πολλὸν ἀρίστη.

Humano generi nam lex datur ab Jove summo:  
Quippe feræ, pisces, avium genus altivolantum  
Mutua se vertunt in pabula, juris egentēs,  
Justitia at nobis, quæ res est optima, cessit.

Cap. 16.

In equis, in leonibus justitiam non dicimus, inquit Cicero de Officiis primo. Plutarchus in vita Catonis majoris, νόμον μὲν γὰρ καὶ δικαίῳ πρὸς ἀνθρώπους μόνον χρῆσθαι πεφυκάμεν· *lege et justitia adversus homines tantum natura utimur.* Lactantius, Lib. v. cap. 17: *In omnibus enim videmus*

<sup>7</sup> Vide PUFENDORFIUM nostrum *De Jure Nat. et Gent.* Lib. II. cap. iii. § 2, 3. *J. B.*

<sup>8</sup> Ἀνθρώποισι δ' ἔδωκε δίκην] *Juvenalis Sat.* xv. v. 142. et seqq.

— Venerabile soli

Sortiti ingenium divinorumque capaces,  
Atque excoendis captendisque artibus apti,  
Sensum o cœlesti demissum traximus arce,  
Cujus egent prona et terram spectantia, Mundi  
Principio indulsit communis Conditor illa.  
Tantum animas, nobis animum quoque, mutuas  
ut nos

Affectus potere auxilium et prestare juberet,  
Dispersos trahere in populum, etc.

Chrysostomus ad VII. Rom. (*Homil.* VIII. p. 118): τὸν τοῦ δικαίου καὶ ἀδίκου λόγον οὐδὲ κινεῖν δεῖ ἐπὶ τῶν ἀψύχων

καὶ ἀναισθητῶν. [Id est, justī et injustī regulas, neque adversus inanimata et sensu carentia, movendas aut negligendas. Quod igitur innuere potius videtur, jus aliquod esse Brutis cum Homine commune. *J. B.*]

<sup>7</sup> *Si quis in parentes injurias fuisset*] Exemplum vide in Chamo, Gen. ix. 22. Ubi pœna sequitur.

<sup>8</sup> Καὶ δυσαρτεῖσθαι τοῖς παροῦσι] Chrysostomus XIII. *de Statuis* [Tom. VI. pag. 550]: καὶ γὰρ τὸ συναγακτικὴν τοῖς ὑβριζομένοις, φυσικὸν ἅπαντες ἔχομεν. εὐθείως οὖν τοῖς ἐπηρᾶζουσιν ἐχθροὶ γινόμεθα καὶ μηδὲν ὡμεν αὐτοὶ πεπονθότες. *Natura id habemus, ut indignationem nostram*

XI. 1 What the Roman lawbooks say of a law of nature which we have in common with animals, which they call more peculiarly *jus naturæ*, besides the natural law which we have in common with men, which they often call *jus gentium*, is of little or no use. For no creature is properly capable of *Jus*, which does not by nature use general precepts: as has been remarked by Hesiod, Cicero, Lactantius, Polybius. [See the quotations.]



*animalibus, quæ sapientia carent, conciliatricem sui esse naturam. Nocent enim aliis ut sibi prosint: nesciunt enim quia malum est nocere. Homo vero, quia scientiam boni et mali habet, abstinere se a nocendo etiam cum incommodo suo.* Polybius, cum narrasset quibus initiis primum convenissent homines, addit, <sup>1</sup>si quis in parentes aut beneficos injurius fuisset, fieri non potuisse quin id ceteri ægre ferrent, ratione addita: τῶν γὰρ γένους τῶν ἀνθρώπων ταύτη δια- Lib. vi. 4.  
 φέροντος τῶν ἄλλων ζώων, ἢ μόνοις αὐτοῖς μέτεστι νοῦ καὶ λογισμοῦ φανερόν ὡς οὐκ ἂν εἰκὸς παρατρέχειν αὐτοὺς τὴν προειρημένην διαφορὰν, καθάπερ ἐπὶ τῶν ἄλλων ζώων, ἀλλ' ἐπισημαίνεσθαι τὰ γινόμενα <sup>2</sup>καὶ δυσαρεστεῖσθαι τοῖς παροῦσι: *quoniam enim humanum genus hoc aliis animantibus distat, quod mente ac ratione utitur, omnino credibile non est tam alienum a natura sua actum ab ipsis dissimulatum iri, ut in aliis animantibus: sed quod factum est, revocatum iri ad animum cum offensæ significatione.*

2 Quod <sup>1</sup>si quando brutis animantibus justitia tribuitur, id fit improprie <sup>2</sup>ex quadam in ipsis umbra rationis atque vestigio. An vero actus ipse, de quo jus naturæ constituit, sit nobis communis cum aliis animantibus, ut proles educatio;

*conjugamus cum iis qui male tractati sunt. illico enim injuriis hominibus insensum sumus, etiam si ad nos nulla pars injuriæ pervenit.* Scholiastes ad Horatium, *Satyra III.* Lib. I. [vers. 97]. *Sensus aliter indignatur et animus, cum audierit homicidium factum, aliter cum furtum.* [In fine loci Polybiani, pro vocibus τὰ γινόμενα, legitur τὸ γινόμενον, in Ed. Casauboni.]

<sup>1</sup> *Si quando brutis animantibus justitia tribuitur*] Divinationem quandam justitiæ in elephantis notat Plinius Lib. VIII. cap. 5. Idem [libro x.] narrat aspidem fuisse quæ suum ipsa catulum necaret, quod is catulus hospitis filium interemisset.

<sup>2</sup> *Ex quadam in ipsis umbra rationis atque vestigio*] Seneca de *Ira* libro I. cap. 3. *feras ira carere dixit, sed pro ira habere impetum. Muta animalia, ait, humanis affectibus carent: habent autem similes illis quosdam impulsus.* Sic in bestiis non esse κακίαν sed οὐλοὶν κακίαν, non vitia sed vitiorum simulacra, dixit [Origenes contra Celsum]: *ὡς ἂν θυμοῦσθαι τὸν λέοντα, velut irasci leonem.* [L. IV. p. 225.] Peripatetici apud Porphyrium, *de non esu animantium tertio.* [Pag. 309. Adde quæ habet de *Stoicis*, Cl. HEINZCCIUS, *Elem. Juris Civil. secundum ordinem Institution. Justin.* Lib. I. Tit. xxvi. § 303. in Not.]

2 If we ever assign justice to brute animals, it is improperly, when we see in them some shadow or vestige of reason. There being acts which we have in common with brutes, as the rearing of offspring, and others which are peculiar to us, as the worship of God, has no bearing on the nature of *Jus*.

an nobis proprius, ut Dei cultus, ad juris ipsam naturam nihil refert.

XII. 1 Esse autem aliquid juris naturalis probari solet tum ab eo quod prius est, tum ab eo quod posterius, quarum probandi rationum illa subtilior est, hæc popularior. A priori, si ostendatur rei alicujus convenientia aut disconvenientia necessaria cum natura rationali ac sociali: a posteriori vero, si non certissima fide, <sup>8</sup> certe probabiliter admodum, juris naturalis esse colligitur id, quod apud omnes gentes, aut moratiores omnes tale esse creditur. Nam universalis effectus universalem requirit causam; talis autem existimationis causa vix ulla videtur esse posse præter sensum ipsum, communis qui dicitur.

2 Hesiodi est dictum a multis laudatum<sup>9</sup>:

Φήμη δ' οὔτις πάμπαν ἀπόλλυται, ἦντινα πολλοὶ  
Λαοὶ φημίζουσι·

Non etenim penitus vana est sententia, multi  
Quam populi celebrant.

<sup>8</sup> Quousque ratio illa valere queat, vide apud ΡΥΞΕΝΔΟΥ. *De Jur. Nat. et Gent.* Lib. II. cap. 3. § 7, 8 et in Præfatione nostra Gallica ad hoc opus, § 4. *J. B.*

<sup>9</sup> Exstat in *Operib. et Dieb.* vers. penult. sed ibi agitur tantum de rumoribus adversus aliquem sparsis, qui, falsi licet, famam ejus nonnihil lædunt. *J. B.*

× Τα κοινῇ φαινόμενα πιστά] Aristoteles *Nicom.* x. 11: ὁ γὰρ πᾶσι δοκεῖ τοῦτο εἶναι φαινόμενον, ὃ δ' ἀναιρῶν ταύτην τὴν πίστιν οὐ πάνυ πιστότερα ἐρεῖ. *Quod omnibus ita videtur, id ita esse dicimus, qui vero hanc fidem velit tollere, nihilo ipse credibilia dicet.* Seneca, *Epist.* 81. *In tanta judiciorum diversitate referendam bene merentibus gratiam omnes uno tibi, quod aiunt, ore affirmabunt.* Quintilianus: *Consuetudinem*

*sermonis vocabo consensum eruditorum, sicut vivendi, consensum bonorum.* (*Instit. Orat.* Lib. I. cap. 6.) Josephus *Antiquæ Historiæ* xvi. (Cap. vi. sect. 8): ἔθεσιν μὲν γὰρ οὐδέν ἐστι γένος ὁ τοῖς αὐτοῖς δὲ χρήται, κατὰ πόλεις ἐσθ' ὅση πολλῆς γινομένη τῆς διαφορᾶς. τὸ δίκαιον δὲ πᾶσιν ἀνθρώποις ὁμοίως ἐπιτηδεύει, λυσιτελέστατον δὲ Ἑλλησὶ τε καὶ βαρβάροις, οὐ πλεῖστον οἱ παρ' ἡμῖν νόμοι λόγον ἔχοντες, ἀπᾶσιν ἡμᾶς, εἰ καθαρῶς ἐμμένοιμεν αὐτοῖς, εὐνοῦς καὶ φίλους ἀπεργάζονται. διὸ καὶ ταῦτα παρ' ἐκείνων ἡμῖν ἀπαιτητέον, καὶ δεῖον οὐκ ἐν διαφορᾷ τῶν ἐπιτηδευμάτων οἰεσθαι τὸ ἀλλότριον, ἀλλ' ἐν τῷ πρὸς καλοκῆραθιαν ἐπιτηδείως ἔχειν· τοῦτο γὰρ κοινὸν ἅπασιν, καὶ μόνον ἱκανὸν διασώζειν τὸν τῶν ἀνθρώπων βίον. *Moribus gens nulla est quæ tisdem tota utatur,*

XII. 1 That there is such a thing as Natural Law, is commonly proved both *a priori* and *a posteriori*; the former the more subtle, the latter, the more popular proof. It is proved *a priori* by shewing the agreement or disagreement of anything with the rational and social nature of man. It is proved *a posteriori* when by certain or very probable accounts we find anything accepted as Natural Law among all nations, or at least the more civilized. For a universal effect

Ἐὰ κοινῇ φαινόμενα πιστὰ, ἡ quæ communiter ita videntur fida sunt, aiebat Heraclitus statuens λόγον τὸν [Ethic. Eud. I. 6.] ζυγὸν optimum esse veritatis κριτήριον. Aristoteles: κράτιστον πάντας ἀνθρώπους φαίνεσθαι συνομολογοῦντας τοῖς ῥηθησομένοις: *potentissima probatio est, si in id quod dicimus omnes consentiant.* Et Cicero: *in re consensio omnium gentium jus naturæ putanda est.* Seneca: *Argumentum veritatis est aliquid omnibus videri.* Quintilianus: *Pro certis habemus ea in quæ communi opinione consensum est.* Non frustra autem dixi gentes moratiores: nam, ut recte notat Porphyrius, Ἰτινὰ τῶν ἐθνῶν ἐξηγηριῶται, καὶ ἐστὶ φύσει θηριώδη, ἐξ ὧν οὐ προσήκει τοὺς εὐγνώμονας τῆς ἀνθρωπίνης καταψεύδεσθαι φύσεως: *quædam nationes efferatæ sunt, et factæ inhumanæ, ex quibus non oportet ab æquīs iudiciibus æstimatione facta humanæ naturæ conviciū fieri.* Andronicus Rhodius: *παρ' ἀνθρώποις τοῖς τε ὀρθῶς καὶ ὑγιῶς ἔχουσιν, ἐστὶ δίκαιον ἀκίνητον, ὃ φυσικὸν λέγεται. εἰ δὲ τοῖς νοσοῦσι τὰς φρένας καὶ διεστραμμένοις οὐ δοκεῖ δίκαιον,*

1 Tusc. 13.

Epiat. 117.

Inst. Orator. v. 10.

De non eru Animant. iv. p. 428.

Paraph. in Arist. Ethic. Nic. v. 10.

*sæpe oppidatim discrepatur plurimum. At jus ipsam omnibus æqualiter hominibus expedit, tam barbaris utile quam Græcis, cujus quidem rationem habentes maximam, quæ apud nos sunt leges, faciunt nos, eas pure modo observemus, cunctis hominibus benevolos et amicos. Talia sunt quæ exigi a legibus par est. Neque illas aversari ut a se alienas arbitrari debent alii, in eo quod institutis differunt, sed id potius spectandum an ad virtutem ac probitatem sint accommodatæ. Hoc enim ad omnes communiter pertinet, solumque per se sufficit ad tutandam hominum vitam. Tertullianus, Præscriptione Adversus Hæreticos (cap. 28): Quod apud multos unum invenitur, non est erratum sed traditum. [Omnia ista loca, si duo priora excipias, parum ad rem faciunt. Immo verba Quintiliani contrarium in-*

*nuere potius videntur. J. B.]*

<sup>1</sup> Refert id SEXTUS EMPIRICUS, Lib. VII. *Adversus Mathematic.* "Ὅθεν τὸ μὲν κοινῇ πᾶσι φαινόμενον, τοῦτ' εἶναι πιστόν. § 134, p. 399. Vide sequentia. Porro locus Aristotelis postea laudatus, Κράτιστον &c. exstat *Eudemior*. Lib. I. cap. vi. p. 199 G, Tom. II. J. B.

<sup>2</sup> Ἰτινὰ τῶν ἐθνῶν ἐξηγηριῶται] Justinus colloquio cum Tryphone [p. 320 D, § 93]: *πλὴν ὅσοι ὑπὸ ἀκαθάρτου πνεύματος ἐμπεφορημένοι, [καὶ ὑπὸ φαύλης] ἀνατροφῆς, καὶ ἐθῶν φαύλων, καὶ νόμων πονηρῶν διαφθαρέντες, τὰς φυσικὰς ἐννοίας ἀπώλεσαν. Exceptis illis qui ab impuris spiritibus abrepti, et per malam educationem, instituta prava et leges iniquas corrupti, naturales notiones perdidierunt. Philo libro, Omnem bonum esse liberum: διὸ καὶ θανάμδα*

requires a universal cause: now such a universal belief can hardly have any cause except the common sense of mankind.

Hesiod, Heraclitus, Aristotle, Cicero, Seneca, Quintilian, agree that the consent of all nations is evidence of the truth. And Porphyry, Andronicus of Rhodes, Plutarch, Aristotle, agree that the more savage nations are of less weight in such an estimate. [See the quotations.]

οὐδὲν διαφέρει, οὐδὲ γὰρ ὁ λέγων τὸ μέλι γλυκὺ εἶναι ψεύδεται, διότι τοῖς νοσοῦσιν οὐ τοιοῦτον δοκεῖ. *Apud homines recta sanaque mente præditos immutabile est jus illud naturæ quod dicitur. Quod si his, qui morbido distortoque sunt animo, aliter videtur, nihil id ad rem pertinet. Nam nec mentitur qui mel dulce esse dicit, ideo quod ægrotis aliter videatur.* A quibus non abit Plutarchi illud in vita Pompeii: φύσει μὲν ἄνθρωπος οὔτε γέγονεν, οὔτ' ἔστιν ἀνήμερον ζῶον οὐδ' ἄμικτον, ἀλλ' ἐξίσταται τῇ κακίᾳ παρὰ φύσιν χρώμενος, ἔθεσι δὲ καὶ τόπων καὶ βίου μεταβολαῖς ἐξημεροῦται· *natura quidem nullus hominum aut est aut fuit ferum atque insociabile animal sed efferatur ubi extra naturæ modum peccare assuescit, rursusque alia consuetudine vitæque et locorum mutatione redit ad mansuetudinem.* Aristoteles descriptionem hominis, ex eo quod ipsi proprium est, hanc facit; ἄνθρωπος, <sup>2</sup>ζῶον ἡμερον φύσει· *homo animal est evarpte natura mansuetum.* Idem alibi: δεῖ δὲ σκοπεῖν ἐν τοῖς κατὰ φύσιν ἔχουσι μᾶλλον τὸ φύσει, καὶ μὴ ἐν τοῖς διεφθαρμένοις· *quid naturalis sit spectandum in his quæ bene secundum naturam se habent, non in depravatis.*

p. 633. D.

Top. v. 2.

Pol. I. 5.

ἀν τις τῆς ἀμβλυωπίας τοὺς τρανὰς οὕτω πραγμάτων ιδιότητας μὴ συνωρῶντας· *merito igitur miretur quis, tantam illis offusam caliginem, ut tam claras rerum proprietates non videant,* [p. 871. B.] Chrysostomus oratione, Christum Deum esse: μὴ τοίνυν ἀπὸ τῶν διεφθαρμένων τὰς γνώμας, τὰς κρίσεις ποιῶν τῶν πραγμάτων· *Ne ergo rerum dijudicationem ab illis mutare quibus corruptus est animus.* [Tom. VI.

p. 634. int.]

<sup>2</sup>ζῶον ἡμερον φύσει] Idem dicit Chrysostomus XI. de Statuis. [Tom. VI. p. 537.] Latius id explicat Philo decalogo: ἀγελαστικὸν γὰρ καὶ σύννομον ζῶον τὸ ἡμεράτατον ἢ φύσει γεννήσασα, πρὸς ὁμοίαν καὶ κοινωνίαν ἐκάλεσε, λόγον δοῦσα συναγωγῶν εἰς ἀρμονίαν καὶ κράσιν ἡθῶν· [pag. 763. A.] *Quod animalium esse debeat mansuetissimum, idem*

XIII. Thus much of Natural Law; next of Positive or Instituted Law. [See Sect. x. 2.] And this is either Human or Divine.

XIV. Of Human [instituted] Law, first, as more widely known.

This is either the Civil Law, [that is, the National Law,] or Law in a narrower, or in a wider sphere.

The Civil Law is that which governs the State, (*Civitas*).

The State, (*Civitas*) is a perfect [that is, independent] collection of free men, associated for the sake of enjoying the advantages of *jus*, and for common utility.

Law in a narrow sphere, and not derived from the State, though subject to it, is various, as paternal precepts, the commands of a master, and the like.

XIII. Alteram juris speciem esse diximus jus voluntarium <sup>2</sup>quod ex voluntate originem ducit: estque vel humanum vel divinum.

XIV. 1 Ab humano incipiemus, quia id pluribus innuit. Est ergo hoc vel civile, vel latius patens, vel arctius. Civile est quod a potestate civili proficiscitur. Potestas civilis est, quæ civitati præest. Est autem civitas cœtus perfectus liberorum hominum, juris fruendi et communis utilitatis causa sociatus. Jus arctius patens et ab ipsa potestate civili non veniens, quanquam ei subditum, varium est, præcepta patria, dominica, et si qua sunt similia in se continens. Latius autem patens est jus gentium; id est quod gentium omnium <sup>3</sup>aut multarum <sup>4</sup>voluntate vim obligandi accepit. Multarum addidi, quia vix ullum jus reperitur extra jus naturale, quod ipsum quoque gentium dici solet, omnibus gentibus commune. Imo sæpe in una parte orbis terrarum est jus gentium quod alibi non est, ut de captivitate ac postliminio suo loco dicemus.

2 Probatur autem hoc jus gentium pari modo quo jus non scriptum civile, usu continuo et testimonio peritorum. Est enim hoc jus, ut recte notat Dio Chrysostomus, εὐρημα

*Oraf. xxxvi.*  
p. 642. n.

*natura fecit gregale et coetus appetens, et ad concordiam societatemque vocavit; sermonem etiam præbens qui ingenia attemperando et ad concentum perducendo conciliaret. Idem de Mundi immortalitate: ἡμερώτατον γὰρ ζῶον ὁ ἀνθρώπος, λόγον δωρησαμένης φύσεως αὐτῷ γίγας, ἧ καὶ τὰ ἐξηγηριωμένα πάθη κατεπέδεται καὶ τιθασσεύεται. Mansuetissimum animantium homo est, ut cui natura pro munere sermonem dederit, quo affectus quantumvis efferati velut*

*incantando cicurantur. (p. 945. E.)*

<sup>2</sup> Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. 1. cap. vi. § 18. *J. B.*

<sup>3</sup> *Aut multarum*] Vasquius II. *Controvers.* LIV. 4.

<sup>4</sup> Tale jus non datur. Quæ enim ad illud referuntur, vel ad *Jus Naturæ* immutabile pertinent, vel meri sunt mores, inter plures aut pauciores Gentes recepti, qui per se nullam vim obligandi habent, sed tunc demum illam accipiunt, quando quis heic et nunc se illis subji-

Law in a wider sphere is *Jus Gentium*, the Law of Nations, that Law which has received an obligatory force from the will of all nations, or of many.

I have added "*or of many,*" because scarce any Law is found, except Natural Law, (which also is often called *Jus Gentium*,) common to all nations. Indeed that is often *Jus Gentium* in one part of the world which is not so in another; as we shall shew when we come to speak of captivity and of *postliminium*.

2 This *Jus Gentium*, Law of Nations, is proved in the same manner as the unwritten Civil Law, by constant usage, and the testimony of those who have made it their study. It is, as Dio Chrysostom says,

*βίου καὶ χρόνου, repertum temporis et usus.* Atque in eam rem maximum nobis usum præbent illustres annalium conditores.

XV. 1 Jus voluntarium divinum quod sit, satis ex ipso vocum sono intelligimus: 'id nimirum quod ex voluntate divina ortum habet: quo discrimine a jure naturali, quod item divinum dici posse diximus, internoscitur. In hoc jure locum habere potest, quod nimium indistincte<sup>b</sup> dicebat Anaxarchus apud Plutarchum in Alexandro: non ideo id Deum velle, quia justum est, sed justum esse, id est jure debitum, quia Deus voluit.

2 Hoc autem jus aut datum est humano generi, aut populo uni. Humano generi ter jus datum a Deo reperimus: statim<sup>c</sup> post hominem conditum, iterum in reparatione humani generis post diluvium, postremo in sublimiori reparatione per Christum. Tria hæc jura haud dubie omnes homines obligant, ex quo quantum satis est ad eorum notitiam pervenerunt.

XVI. 1 Ex omnibus populis unus est, cui peculiariter Deus jura dare dignatus est, populus scilicet Hebræus, quem

cit, pacto expresso vel tacito. Qua de re diximus in Notis Gallicis ad hunc nostrum Auctorem. Vide et PUFENDORF. *De Jur. Nat. et Gent.* II. 3. 23. *J. B.*

<sup>c</sup> Vide Auctoris Epist. Part. II. Epist. 429. ubi refellit, quæ SALMASIUS

adversus eum dixerat. *J. B.*

<sup>b</sup> *Dicebat Anaxarchus*] Est apud Plutarchum in Alexandro. [pag. 595. A. Tom. I. Vide quæ de illo loco scripsimus, in PUFENDORF. *De Jur. Nat. et Gent.* Lib. II. cap. 3, § 4, n. 1. *J. B.*]

<sup>c</sup> De his omnibus fuse egimus in Notis

the invention of life and of time. And here the best historians are a great help to us\*.

XV. 1 What is Divine [instituted] Law is sufficiently apparent from the term itself; namely, that which has its origin from the Divine Will; by which character it is distinguished from Natural Law, which also may be called Divine, [but which is independent: see § x, 5]. In such Law it may be said, but with reserve, that God did not command the act because it was just, but that it was just because God commanded it.

2 This Law is given either to the whole human race, or to one nation. To the human race, the Law has thrice been given by God; at the Creation; immediately after the Deluge, and at the coming of

\* Concerning the distinction of the two senses of *Jus Gentium*, that of the Romans, with whom it means the Law common to all nations, and that of the moderns with whom it means the Law between nations, see *Elements of Morality*, 1051.

sic alloquitur Moses Deut. iv. 7. *Quæ gens tam magna, cui Dei propinqui, sicut dominus Deus noster, ad omnia vota quæ ei facimus? quæ gens tam magna, cui sint constitutiones et jura æqua, qualis est lex hæc tota, quam ego hodie coram vobis propono?* Psalmographus Psalmo cxlvii: V. 19, 20. *Indicat Deus verba sua Jacobo, constitutiones ac jura sua Israeli, non ita fecit genti ulli: ideo jura ista non noverrunt.*

2 Nec dubitandum, quin fallantur Judæorum illi (quos inter Tryphon in disputatione cum Justino) qui existimant etiam alienigenis, si salvi esse vellent, subeundum fuisse legis Hebraicæ jugum. <sup>6</sup>Neque enim eos obligat lex, quibus data non est. At quibus data sit lex, ipsa loquitur: *Audi Israel.* Et passim fœdus cum ipsis ictum, ipsi in peculiarem Dei populum adsciti dicuntur: quod verum esse agnoscit et ex loco Deuteron. xxxiii. 4. probat Maimonides.

3 Quin inter ipsos Hebræos vixerit semper aliqui exteri homines *εὐσεβείς καὶ σεβόμενοι τὸν Θεόν*, qualis Syrophœnissa Matth. xv. 22; qualis ille Cornelius Actor. x. 2, *τῶν σεβομένων Ἑλλήνων*. Actor. xvii. 4, Hebraice *יִשְׂרָאֵלִים*

nostris Gallicis ad hunc locum. *J. B.*

<sup>6</sup> Quæstio de salute *Ethnicorum* heic omnino seponenda, utpote ad rem nihil faciens. Sive enim Ethnici, absque cognitione et observatione Legis Hebraicæ vitam æternam consequi poterint, sive non potuerint: hoc certum,

eos, qui illa excludentur, non ideo damnatum iri, quod Legem eam ignoraverint, adeoque non observaverint, cujus nullam notitiam habebant, nec habere poterant; sed quod adversus Legem Naturalem, quam ex lumine Rationis haurire eis licebat, peccaverint. *J. B.*

Christ. These three sets of Laws oblige all men, as soon as they acquire a sufficient knowledge of them.

XVI. 1 There is one nation in particular to which God has especially given his Laws, namely, the Hebrew people. See Deut. iv. 7; Psalm cxlvii.

2 It is erroneous to suppose (as some Jews have done) that those of other nations, in order to be saved, must submit to the Jewish law. For the law does not oblige those to whom it is not given; and it tells us itself to whom it is given, by saying, "Hear, O Israel." And the Jews are perpetually spoken of as under a special covenant, and chosen to be a peculiar people of God; as Maimonides proves from Deut. xxxiii. 4.

3 There were however always living among the Jews certain "devout persons," as the Syrophœnician woman, Cornelius, the "devout Greeks" (Acts xvii. 4), who are also spoken of in various passages of

אומות p̄ii ex Gentibus: ut legitur <sup>c</sup> titulo Thalmudico de Rege. Talis qui est, in lege dicitur בְּיַנְכֹר Levit. xxii. 25, גַּר וְתוֹשֵׁב Levit. xxv. 47, ubi Chaldæus dixit <sup>d</sup> incolam incircumcisum. Hi, ut narrant ipsi Hebræorum magistri, leges Adamo et Noë datas servare tenebantur, abstinere ab idolis et sanguine, et aliis quæ infra suo loco memorabuntur, at non item leges proprias Israelitarum. Itaque cum Israelitis non liceret vesci carne bestię quæ fato suo periisset, peregrinis tamen inter ipsos viventibus id licebat, Deuter. xiv. 21. Nisi quod quibusdam legibus specialiter expressum est, ut incolæ iis non minus quam indigenæ teneantur<sup>7</sup>.

4 Extraneis etiam, qui aliunde advenirent, neque institutis Hebraicis subjicerentur, in templo Hierosolymitano licuit Deum adorare, et victimas offerre, <sup>e</sup>stantibus tamen in loco peculiari ac separato a statione Israelitarum, 1 Reg. qui Latinis 3 Reg. viii. 41, 2 Macc. iii. 35, Johan. xii. 20, Ac-

<sup>c</sup> *Titulo Thalmudico de Rege*] Et titulo de Synedrio, cap. 11.

<sup>d</sup> *Incolam incircumcisum*] De tali agitur et *Exodi* xii. 45. A quo distinguitur proselytus, id est circumcisus advena, ut ostendit collatio loci *Num.* ix. 14. De piis illis incircumcisus multa habet Maimonides libro *de Idololatria*, c. x. § 6. Idem in commentario ad *Misnajoth*, et alibi sæpe, piis illos ex gentibus participes ait futuros bonorum futuri sæculi. Chrysostomus ad Romanos cap. 2: *ποιον Ἰουδαίων ἐνταῦθα φησιν, ἢ περὶ ποίων Ἑλλήνων διαλέγεται; τῶν πρὸ τῆς τοῦ Χριστοῦ παρουσίας. οὐπω γὰρ εἰς τοὺς τῆς χάριτος ἐφθάσε χρόνους ὁ λόγος* quem *Judeum* hic indicat, et de quibus *Græcis*

*disserit? de iis qui ante Christi adventum fuere: nondum enim ad Græcia tempora perducta est oratio.* Deinde: *Ἑλληνας δὲ ἐνταῦθα φησιν, οὐ τοὺς εἰδωλολατροῦντας, ἀλλὰ τοὺς θεοσεβούντας, τοὺς τῷ φυσικῷ κειτομένους λόγῳ, τοὺς πλὴν τῶν Ἰουδαϊκῶν παρατηρήσεων πάντα τὰ πρὸς εὐσέβειαν συντελοῦντα διατηροῦντας.* Exempla dat in Melchisedeco, Jobo, Nini-vitis, Cornelio, mox: *Ἑλλήνα δὲ πάλιν οὐ τὸν εἰδωλόλατρη, ἀλλὰ τὸν θεοσεβῆ καὶ ἐνάρετον καὶ τῶν νομικῶν παρατηρήσεων ἀπηλλαγμένον φησί.* *Græcos* hic dicit, non idolorum cultores, sed in *Deum* piis, naturali rationi obsequentes, qui præter Judaica instituta, cuncta quæ ad pietatem facerent servabant. Et *Græ-*

the Old Testament [see the references.] These, as the Jewish doctors teach, were bound to obey the laws given to Adam and to Noah, to abstain from idols and from blood, and some other matters; but not to observe the peculiar Jewish laws: except that some laws expressly direct that not only the Jew, but the stranger within his gate should be bound by them: [as the law of the Sabbath: *Exod.* xx. 10].

4 It was also permitted to strangers to worship and to sacrifice in the temple; but standing in a peculiar place, separate from the place of the Israelites.

The prophets speaking to strangers; Elisha to Naaman, Jonah to



tor. viii. 27. <sup>f</sup>Neque Elisæus Naamani Syro, neque Jonas Ninivitis, neque Daniel Nabuchodonosoro, neque Prophetæ alii Tyriis, Moabitis, Ægyptiis, ad quos scribunt, unquam significarunt opus ipsis esse ut Mosis legem susciperent<sup>g</sup>.

5 Quod de tota lege Mosis dixi, idem et de circumcissione, quæ legis quasi introitus erat, dictum volo. Hoc tantum interest quod lege Mosis Israelitæ soli tenebantur, circumcissionis autem lege tota Abrahami posteritas: unde Idumæos a Judæis coactos circumcissionem suscipere in historiis Hebræorum et Græcorum legimus. Quare qui populi extra Israelitas circumcisi sunt (sunt autem complures, quorum Herodotus, Strabo, Philo, Justinus, Origenes, Clemens Alexandrinus, Epiphanius, <sup>g</sup>Hieronimus, meminerunt) eos credibile est ab Ismaele, aut ab Esavo, aut <sup>h</sup>ex Cethuræ posteris venisse.

6 Ceterum in aliis omnibus locum habebat Pauli illud,

*cum rursus vocat, non cultorem idolorum, sed pium, virtute præditum, a legis vero ritibus liberum.* Eundem in sensum trahit illud, τοῖς ἀνόμοις ὡς ἄνομος, lege solutis ut lege solutus. et oratione xii. de Statuis: "Ἐλλῆνα ἐνταῦθα καλεῖ οὐ τὸν εἰδωλολάτρην, ἀλλὰ τὸν προσκυνοῦντα μὲν τὸν θεὸν μόνον, οὐκ ἐνδεδεμένον δὲ τῇ τῶν Ἰουδαϊκῶν παρατηρήσεων ἀνάγκῃ, σαββατισμοῖς λέγῳ καὶ περιτομῇ καὶ καθαρισμοῖς διαφόροις, ἀλλὰ φιλοσοφίαν ἄπασαν καὶ εὐσέβειαν ἐνδεικνύμενον. Græcum hic appellat, non idolis deditum, sed unius Dei invocatorem, talem tamen qui Judaicorum rituum necessitati alligatus non sit, sabbatorum puta observationibus, circumcissioni, variis ablutionibus, inte-

*rim qui in omnibus sapientiæ studium pietatemque ostendat.* [Tom. vi. pag. 54.]

<sup>7</sup> Ut in prohibitione operis faciendi die Sabbathi, *Exod. xx. 10.* J. B.

<sup>e</sup> *Stantibus in loco peculiari*] Vide Josephum ubi Templi Salomonis historia tractatur. [Confer doctissimum SELDENUM, *de Jur. Nat. et Gent. secundum Hebr. Lib. III. cap. 6.* J. B.]

<sup>f</sup> *Neque Elisæus Naamani Syro*] Idem sentit Hilarius ad Matth. xi.

<sup>g</sup> Adde, quæ Auctor habet in alio Opere, *de Verit. Relig. Christ. Lib. v. § 7.* J. B.

<sup>h</sup> *Hieronimus*] Addi potest *Theodoretus.*

<sup>h</sup> *Ex Cethuræ posteris*] Ex his orti

the Ninevites, Daniel to Nebuchadnezzar, and other prophets to the Tyrians, Moabites, and Egyptians; never say that they were required to submit to the Law of Moses.

5 The same is true of circumcision; with this difference, that the Law of Moses bound the Israelites only, the law of circumcision, all the posterity of Abraham; whence the Jews imposed circumcision on the Idumeans. Therefore the other peoples who used circumcision were probably descended from Ishmael or from Esau, or from Keturah [Abraham's wife, Gen. xxv. 1].

6 In all other cases, the reasoning of St Paul, Rom. ii. 14, ap-

Rom. ii. 14. *Cum gentes quæ legem non habent<sup>1</sup> natura suapte* (id est moribus ex primævo fonte manantibus: nisi quis malit illud *natura* referre ad præcedentia, ut opponantur gentes Judæis quibus statim natis lex instillabatur) *faciunt ea quæ legis sunt: isti legem non habentes sibi sunt lex: ut qui ostendant ipsum opus legis mentibus suis inscriptum, simul testimonium reddente ipsorum conscientia, et cogitationibus sese mutuo accusantibus aut etiam excusantibus.* Et illud ibidem. *Si præputium* (id est præputiatus homo) *observet mandatum legis, nonne præputium illius pro circumcissione reputabitur?* Bene ergo in Josephi historia Ananias Judæis Izaten Adiabenum (Ezaten hunc Tacitus vocat) docebat<sup>k</sup> etiam citra circumcisionem Deum recte coli et propitium haberi posse. Nam quod extranei multi circumcisi sunt, et per circumcisionem legi se obligarunt (ut explicat Paulus Gal. v. 3) id fecerunt partim ut jus civitatis adipiscerentur (nam proselyti qui Hebræis צדק יגד hospites justitiæ, <sup>1</sup>pari jure erant cum Israelitis, Num. xv.) <sup>m</sup>partim ut earum

Antiq. xx. 2.  
§ 5.  
Ann. xii. 14.

videntur Æthiopum illi, quos circumcisis annumerat Herodotus: Homeritas illos vocat Epiphanius. [Homeritæ pars erant Idumæorum; et Auctor ipse id dixit, in libr. *De Verit. Relig. Christ.* L. 1. § 16, pag. 63, not. 75, nuperæ ed. Amst. 1718. Ceterum heic, ex sententia ipsius ævo recepta, ponit pro certo, circumcisionem ab Hebræis ad alias gentes manasse. Quem tamen probabile est aliud censurum fuisse, si MARSHAM et SPENCEI, Eruditissimorum Anglorum, opera videre potuisset. J. B.]

<sup>1</sup> *Natura suapte*] Τοῖς τῆς φύσεως λογισμοῖς, collectionibus naturalibus, ait

Chrysostomus. Idem mox: διὰ τοῦτο γὰρ, φησὶν, εἰσι θαναταστοι, ὅτι νόμου οὐκ ἔδειθησαν. *Ob hoc, inquit, admirandi sunt quod lege opus non habuerint.* Item: ἀρκεῖ ἀντὶ τοῦ νόμου τὸ συνειδὸς καὶ λογισμὸς. *Sufficit pro lege conscientia et rationis usus.* Tertullianus *adversus Judæos*, (cap. 2): *Ante legem Moysis scriptam in tabulis lapideis, legem fuisse contendo non scriptam, quæ naturaliter intelligebatur, et a patribus custodiebatur.* Non longe hinc abit Isocraetum illud: [pag. 148. A. in *Orat. Areopag.*] δεῖ τοὺς εὐ πολιτευομένους οὐ τὰς στοὰς ἐμπικλᾶναι γραμμάτων, ἀλλ' ἐν ταῖς ψυχαῖς ἔχειν τὸ δίκαιον.

plies. The Gentiles are a law to themselves: the uncircumcision, keeping this law, is counted for circumcision [v. 26]. And this was acknowledged [see the example]. But circumcision was sometimes undergone by strangers for special objects [see the text]. Yet some in later times perversely held that there was no salvation out of the pale of Judaism.

7 Hence we learn that we are not bound by any part of the Jewish law, peculiarly so called; because all obligation extraneous to Natural Law comes from the will of the Lawgiver; and there is no

promissionum essent participes, quæ non communes humano generi, sed Hebræo populo erant peculiare: quanquam non negem posterioribus sæculis accessisse etiam in nonnullis pravam opinionem, quasi extra Judaismum salus non esset.

7 Hinc colligimus, nulla parte legis Hebrææ, qua lex est proprie, nos obligari, quia obligatio extra jus naturæ venit ex voluntate legem ferentis. Deum autem voluisse ut alii quam Israelitæ ista lege tenerentur, nullo indicio potest deprehendi. Non igitur, nos quod attinet, probanda est ulla legis abrogatio: nam nec abrogari potuit eorum respectu, quos nunquam obstrinxit. Sed ab Israelitis ablata est obligatio, quoad ritualia quidem, statim postquam lex Evangelii cœpit promulgari; quod Apostolorum principi clare fuit revelatum, Act. x. 15; quoad cetera vero, postquam populus ille, per excidium urbis et desolationem, præcisa omni spe restitutionis, populus esse desiit.

8 Nos vero alienigenæ non id Christi adventu consecuti sumus, ut Mosis lege non teneremur, sed ut qui antea spem

*Qui bona republica frui velint, ii debent non literis implere porticus, sed in animis quod justum est ferre.*

<sup>1</sup> *Etiam citra circumcisionem Deum recte coli et propitium haberi posse*] Ipse Tryphon, de rigore remittens, Justino sic ait: μένοντι σοι ἐν ἐκείνῃ τῇ τῆς φιλοσοφίας τρόπῃ ἕλπις ὑπελείπετο ἀμείνοτος μοίρας· si in illa philosophandi ratione mansisses, erat tibi reliqua spes aliqua status melioris. [pag. 29. Ceterum de Anania isto vide quæ habet V. C. PETRUS WESSELING. *Observat.* Lib. 1. cap. 9].

<sup>1</sup> *Pari jure erant cum Israelitis*] Justinus colloquio cum Tryphone: προσήλυτοι περιτεμνόμενοι, εἰ τῇ λαῶ προσ-

κεχώρηκεν, ἐστὶν ὡς αὐτόχθων. *Proselytus qui circumciscus populo se aggregavit, par est indigenæ.* [p. 351. v. Vide tamen quæ ad hunc l. annotavit Otto. H.]

<sup>2</sup> *Partim ut earum promissionum essent participes*] Et ob id ad Paschalis ritus communionem admittebantur. [Vid. *Exod.* xii. 19, 47, 48].

<sup>3</sup> Ita edidimus, quum antea in omnibus editionibus fuerit, *desolationem præcisam sine spe restitutionis.* Nihili est illud *præcisam*, junctum τῇ *desolationem*. Unde autem error hypothetarum ab Auctore ipso rebus potius quam verbis intento non animadversus manaverit, quis facile conjicere potest. J.B.

indication that it was the will of God that others besides the Israelites should be bound by that law. We have therefore no occasion to prove the abrogation of this law; for it could not be abrogated with regard to those who were never bound by it. With regard to the Jews, the obligation of the Ritual Law was removed on the promulgation of the Gospel, as was revealed to St Peter, Acts x. 15. The rest of the Jewish Law was abolished by the dispersion of the Jewish nation.

8 What we Gentiles have gained by the coming of Christ is, not that we are freed from the law of Moses: but that, wherever formerly

Christianis præstandum. Fundamentum hujus observationis est, quod quæ virtutes a Christianis exiguntur, ut humilitas, patientia, dilectio, exiguntur <sup>p</sup>in majore gradu quam statu legis Hebraicæ exigebantur: idque merito; quia etiam promissiones cœlestes in Evangelio multo clarius proponuntur. Hinc lex vetus comparatione Evangelii dicitur fuisse nec perfecta, nec ἀμεμπτος, Heb. vii. 19; viii. 7. et legis finis dicitur Christus, Rom. x. 5. lex autem manuctrix ad Christum, Gal. iii. 25. Sic lex vetus de sabbato, <sup>q</sup>et altera de decimis, monstrant Christianos obligari, ne minus septima temporis parte ad cultum divinum, nec minus fructuum decima, in alimenta eorum, qui in sacris rebus occupantur, aut similes pios usus seponant.

<sup>p</sup> In majore gradu] Chrysostomus de Virginitate LXXXIV. [Tom. vi. pag. 295]. μείζονα ἐπιδείκνυσθαι δεῖ τὴν ἀρετὴν, ὅτι πολλὰ ἢ τοῦ πνεύματος χάρις ἐκκέχυται νῦν, καὶ μεγάλη τῆς τοῦ Χριστοῦ παρουσίας ἡ δωρεά. Major nunc virtus ostendenda est, quia multa nunc spiritus effusa est gratia, et ingens donum est Christi adventus. Similia habet idem oratione, Esse ex neglectu vitia; et de jejuniis tertio; et ad Romanos vi. 14, et vii. 6. Adde *Irenæum*,

Lib. iv. cap. xxvi. Scriptor Synopseos Sacræ Scripturæ, quæ inter opera est Athanasii, de capite quinto Matthæi agens, ἐπιτελεῖ τὰς ἐν τῷ νόμῳ ἐντολάς, intensiora facit hic Christus legis præcepta. [Tom. II. pag. 122. A. 1686].

<sup>q</sup> Et altera de decimis] Sic lege hæc apud Christianos utitur Irenæus, Lib. iv. cap. xxxiv. et Chrysostomus sub finem capituli ultimi prioris ad Corinthios, et ad Ephesios ii. 10.

ciples, that, at least, if not more, is due from Christians. The foundation of this remark is this: that the virtues which are required of Christians, as humility, patience, kindness, are required in a greater degree than they were under the Jewish Law: and that with good reason; because the heavenly promises are more and more clearly given in the Gospel. And hence, the Old Law is declared not to have been *perfect*, nor *faultless*: and Christ is called *the end of the Law*; and the Law *a schoolmaster to lead us to Christ*. [See the references in the text].

For example, the Old Law concerning the Sabbath, and the Law concerning Tithes, shew that Christians are obliged to give up not less than a seventh part of their time to divine worship; and not less than a tenth part of their goods for the support of those who minister in sacred things, and the like pious uses.

## CAPUT II.

### AN BELLARE UNQUAM JUSTUM SIT.

- |  |   |
|--|---|
| I. <i>Jus naturæ bello non repugnare, probatur rationibus :</i>  | VII. <i>Argumenta pro negante sententia ex sacris literis.</i>                            |
| II. <i>Historia.</i>   | VIII. <i>Solutio argumentorum ex sacris literis pro parte ajente.</i>                     |
| III. <i>Consensus.</i>   | IX. <i>Examinatur veterum Christianorum circa hanc rem consensus.</i>                     |
| IV. <i>Jus gentium non repugnare bello probatur.</i>   | <i>Negans privatim consilio potius, quam præcepto nixa, reprobat.</i>                     |
| V. <i>Jus divinum voluntarium, ante Evangelii tempus, bello non repugnare probatur, cum solutione objectionum.</i> | X. <i>Affirmans, publica Ecclesiæ auctoritate, consensu, et temporum usu confirmatur.</i> |
| VI. <i>Ad quæstionem, an bellum cum jure Evangelico pugnet, præmonita.</i>   |   |

**V**ISIS Juris fontibus, ad primam ac generalissimam veniamus quæstionem, quæ hæc est, an bellum aliquod justum sit, sive, an bellare unquam liceat.

I. 1 Hæc autem ipsa quæstio, ut et aliæ quæ deinceps sequentur, ad jus naturæ primum exigenda est. M. Tullius Cicero tum tertio de Finibus, tum aliis in locis, ex Stoicorum libris erudite disserit, esse quædam prima naturæ, Græcis *τὰ πρῶτα κατὰ φύσιν*, quædam consequentia, sed quæ illis primis præferenda sint. Prima naturæ vocat, quod simulatque natum est animal, ipsum sibi conciliatur et commendatur ad se conservandum, atque ad suum statum, et ad ea quæ conservantia sunt ejus status diligenda : alienatur autem ab inte-

---

#### CHAPTER II. *Whether War ever be just.*

HAVING seen what are the fountains of *Jus* or of Law, let us come to the first and more general question, which is this: Whether any war be just; or, Whether it ever be lawful to make war.

I. 1 This question, and others which will follow, are first to be treated with reference to Natural Law. Cicero repeatedly speaks of certain First Principles, and certain other truths, the consequences of these, but of higher value than those. There is, according to him, a First Principle of Self-preservation. An animal, from its birth, is urged to care for and preserve itself, to choose the means of preserving its good condition, to shun destruction, and every thing which leads to its destruction. Thus there is no one who does not prefer to have the

ritu iisque rebus, quæ interitum videantur afferre. Hinc etiam ait fieri, ut nemo sit, quin cum utrumvis liceat, aptas malit et integras omnes partes corporis, quam easdem usu imminutas aut detortas habere: primumque esse officium, ut se quis conservet in naturæ statu, deinceps ut ea teneat, quæ secundum naturam sint, pellatque contraria.

2 At <sup>a</sup>post hæc cognita sequi notionem convenientiæ rerum cum ipsa ratione quæ corpore est potior; atque eam convenientiam, in qua honestum sit propositum, pluris faciendam, quam ad quæ sola primum animi appetitio ferebatur; quia prima naturæ commendent nos quidem rectæ rationi, <sup>b</sup>sed ipsa recta ratio carior nobis esse debeat quam illa sint a quibus ad hanc venerimus. Hæc cum vera sint et ab omnibus, qui judicio sano sunt præditi, facile sine alia demonstratione assensum impetrent; sequitur in examinando jure naturæ primum videndum quid illis naturæ initiis congruat, deinde veniendum ad illud, quod quanquam post oritur, dignius tamen

<sup>a</sup> *Post hæc cognita sequi notionem convenientiæ rerum cum ipsa ratione] Seneca, ep. CXXIV: quemadmodum omnis natura bonum suum nisi consummata non profert, ita hominis bonum non est in homine, nisi cum in illo ratio perfecta est.*

<sup>b</sup> *Sed ipsa recta ratio carior nobis esse debeat, quam illa sint a quibus ad hanc venerimus] Seneca, ep. LXXVI: Id in quoque optimum est, cui nascitur, quo censetur; in homine optimum quid est? Ratio. vide et ep. cxxi. et cxxiv. Juvenalis, Satyra xv:*

parts of his body sound and whole, rather than maimed and distorted. The first business of each is to preserve himself in the state of nature; the next, to retain what is according to nature, and to reject what is contrary to it.

2 After this Principle, there follows a notion of the Agreement of things with Reason, which is superior to the body; and this Agreement, in which what is reasonable (*honestum*) becomes our object, is seen to be of more importance than those things to which alone the first impulse of appetite tended. The first Principle [of self-preservation] commends us to Right Reason; but Right Reason ought to be dearer to us than those things by which we were first led to use it.

This is allowed by all who are of sound mind, without demonstration. Hence in examining what agrees with Natural Law, we must first see what agrees with that first principle of Self-preservation; and afterwards proceed to that which, though subsequent in origin, is of greater dignity; and must not only accept it, if it be offered, but seek it with all care.

3 This object, what is reasonable, (*honestum*.) has different ranges in different cases, according to the diversity of the matter. Sometimes

est; neque sumendum tantum, si detur, sed omni modo expetendum.

3 Hoc ipsum vero, quod honestum dicimus, pro materiæ diversitate, modo (ut ita dicam) in puncto consistit, ut si vel minimum inde abeas, ad vitium deflectas; modo liberius habet spatium, ita ut et fieri laudabiliter, et sine turpitudine omitti aut aliter fieri possit, ferme quomodo ab hoc esse ad hoc non esse statim fit transitus; at inter aliter adversa, ut album et nigrum, reperire est aliquid interpositum, sive mixtum, sive reductum utrinque. Et in hoc posteriori genere maxime occupari solent leges tum divinæ, tum humanæ, id agendo, ut, quod per se laudabile tantum erat, etiam deberi incipiat. Supra autem diximus, de jure naturæ cum quaeritur, hoc quaeri, an fieri aliquid possit non injuste; injustum autem id demum intelligi quod necessariam cum natura rationali ac sociali habet repugnantiam.

4 Inter prima naturæ nihil est quod bello repugnet,

melius nos

Zenonis præcepta movent: neque enim omnia, quedam, Pro vita faciendæ movent. (v. 106, seqq.)

<sup>1</sup> Exempli gratia, ubi nulla lege Civili vetatur Polygamia, non peccat equidem, qui plures una uxores ducit;

sed tamen, si una contentus sit, facit laudabiliter; idque honestum est, sensu illo latiori. Vide infra Lib. II., cap. v. § 9. J. B.

<sup>2</sup> Sic JUSTINIANUS Imp. in sua quadam constitutione se tale quid egisse gloriatur: *Licet*, inquit, ii [veteres] qui

it lies (as it were) in a point, so that if you depart from it by the smallest space, you fall into a fault: sometimes it has a wider field, so that the thing in question may be either done laudably, or omitted or done otherwise without pravity, according as we pass from the existence to the non-existence of certain conditions\*. Between black and white, we find intermediate and mixed degrees, which approach the one or the other. And it is in this latter class of cases that laws, both divine and human, are mainly occupied; aiming at this, that what of itself was only laudable, may become a duty. As we have said above, that when we examine concerning Natural Law, we inquire whether anything can be done not unjustly; and then that is understood to be unjust, which has a necessary repugnance with a rational and social nature.

4 In the first principle of nature [Self-preservation] there is nothing which is repugnant to war: indeed all things rather favour it:

\* Thus polygamy may be blameless, permitted, or criminal, according to the state of law. Monogamy may be laudable when polygamy is permitted; but may be elevated into a duty in a better state of society. W. W.

imo omnia potius ei favent. nam et finis belli, vitæ membro-  
rumque conservatio, et rerum ad vitam utilium aut retentio  
aut acquisitio, illis primis naturæ maxime convenit: et vi ad  
eam rem si opus sit uti, nihil habet a primis naturæ dissen-  
taneum, cum animantibus singulis vires ideo sint a natura  
attributæ, ut sibi tuendis juvandisque sufficiant. Xenophon:  
τὰ ζῶα ἐπίσταταιί τινα μάχην ἕκαστα, οὐδὲ παρ' ἐνὸς  
ἄλλου μαθόντα ἢ παρὰ τῆς φύσεως· omnia animantium  
genera pugnam norunt aliquam, quam non aliunde quam a  
natura didicerunt. In Halieuticon fragmento est: (ver. 7,  
et seqq.)

Cyrop. II. 3.  
§ 4.

Omnibus hostem,

Præsidiumque datum sentire et nocere teli  
Vimque modumque sui.

Horatius dixerat: [II. Sat. I. 53.]

Dente lupus, cornu taurus petit; unde, nisi intus  
Monstratum?

Lucretius vero amplius: [Lib. v. ver. 1032, et seqq.]

Sentit enim vim quidque suam, qua possit abuti.  
Cornua nota prius vitulo quam frontibus exstant:  
°Illis iratus petit atque infensus inurget.

id permittebant [ut scil. Hæres, et qui in  
ipsius potestate erant, testes essent in  
Testamento] hoc jure minime abuti eos  
debere suadebant: tamen nos... QUOD AB  
ILLIS SUASUM EST, IN LEGIS NECESSITA-  
TEM TRANSFERENTES, &c. Instit. Lib. II.  
Tit. x. De Testam. Ordin. § 10. Vide  
et COD. THEODOS. De Secundis Nup-  
titiis, Lib. III. Tit. viii. Leg. ibique Doc-  
tissimum GOTHOFREDUM, Tom. I. pag.  
285. J. B.

<sup>c</sup> Illis iratus petit atque infensus  
inurget] Martialis III. Epigr. 58:

Vitulusque laani fronte prurit ad pugnam  
Porphyrius tertio De non esu animalium:  
[pag. 268]: πρῶτον μὲν ἕκαστον οἶδεν

εἴτε ἀσθενέες ἐστὶν εἴτε ἰσχυρόν. καὶ τὰ  
μὲν φυλάττεται, τοῖς δὲ χρῆται. ὡς  
πάρδαλις μὲν ὀδοῦσιν. ὄνυξι δὲ λέων καὶ  
ὀδοῦσιν, ἴππος δὲ ὀπλῆ, καὶ βοῦς κέρασι·  
novit quodque animantium quæ pars sui  
infirma sit, quæ valida; illi cavet, hæc  
utitur; ut dentibus pardalis, leo et ungui-  
bus et dentibus; equus ungula, bos cor-  
nibus. Chrysostomus, de Status undecimo:  
τὰ ἀλογα πάλιν ἐν τῷ σώματι  
τὰ ὄπλα ἔχει, οἷον ὁ βοῦς τὰ κέρατα,  
τοῦς ὀδόντας ὅσως ὁ ἄγριος, τοῦς ὄνυ-  
χας ὁ λέων. ἐμοὶ δὲ οὐκ ἐν τῇ φύσει  
τοῦ σώματος τὰ ὄπλα κατέθετο ὁ  
θεός, ἀλλ' ἐξω τοῦ σώματος, δεικνὺς  
ὅτι ἡμερον ζῶον ὁ ἀνθρώπος, καὶ ὅτι

for the end of war, the preservation of life and limb, and the retention  
or acquisition of things useful to life, agrees entirely with that princi-  
ple. And if force be requisite for this purpose, still there is in this  
nothing at variance with nature; for all animals are provided by na-  
ture with means for the very purpose of self-defence. So Xenophon,  
Ovid, Horace, Lucretius. Galen observes that man is an animal



Quem sensum Galenus sic exprimit. Φαίνεται γοῦν ἕκαστον ἐκείνω τῷ μέρει τοῦ σώματος ἀμυνόμενον, ὃ τῶν ἄλλων ὑπερέχει· μόσχος μὲν κυρίττων πρὶν φύσαι τὰ κέρατα, πῶλος δ' ἵππου λακτίζων, οὐδέπω στερεαῖς ταῖς ὄπλαις, ὥσπερ γε τὸ μὲν σκυλάκιον δάκνειν ἐπιχειροῦν, κᾶν μηδέπω κρατεροῦς ἔχη τοὺς ὀδόντας. *Videmus animantium quodque eo ad sui tutelam uti quo maxime valet. Nam et vitulus nondum enatis cornibus ea parte minatur, et equulus nondum firmatis unguis calcitrat, et catellus dentibus nondum robustis morsitat.* Idem Galenus de usu partium primo, hominem animal esse ait ad pacem bellumque natum, cui arma quidem agnata non sint, <sup>d</sup>sed apta armis parandis ac tractandis manus: qua etiam pro armis uti sponte sua nec aliunde id edoctos infantes videmus. Sic et Aristoteles de partibus animalium quarto, capite x. manum homini ait esse pro hasta, pro ense, et pro armis quibuslibet, quia omnia potest sumere ac tenere.

5 Recta autem ratio ac natura societatis, quæ secundo ac potiore loco ad examen vocanda est, non omnem vim inhibet, sed eam demum quæ societati repugnat, id est, quæ jus alienum tollit. Nam societas eo tendit ut suum cuique salvum sit communi ope ac conspiratione. Quod facile intel-

οὐκ αἰέ μοι τῶν ὄπλων τούτων καιρός. καὶ γὰρ πολλάκις μὲν αὐτὸ ἀποκρίθηναι, πολλάκις δὲ μεταχειρίζομαι ἴν' οὐν ἐλεύθερος εἶ καὶ ἀπολαυμένος, καὶ μὴ διηλεκτῶς ἀναγκάζομαι βαστάζειν τὰ ὄπλα, ἐποίησεν αὐτὰ κεχωρισμένα τῆς φύσεως εἶναι τῆς ἐμῆς· quæ postrema optime conveniunt cum illis, quæ ex Galeno in contextu sequuntur. Hoc enim dicit: *Ratione quæ carent, arma in ipso habent corpore, ut bos cornua, dentes aper, unguis leo. At mihi non in corporis natura Deus arma posuit, sed extra corpus; hoc ipso ostendens mansuetum animal esse hominem, neque semper talium armorum mihi esse tempus. Nam*

*telum sæpe depono, resumo interdum. Ut igitur liberior solutioque sim, neque semper cogar portare arma, fecit ea se juncta esse a mea natura.* [Tom. vi. pag. 587].

<sup>d</sup> *Sed apta armis parandis ac tractandis manus, qua etiam pro armis uti sponte sua nec aliunde id edoctos infantes videmus*] Cassiodorus de Anima: *Et quoniam neque cornu, neque dente, neque fuga (sicut alia animalia) corporis humani forma se prævalet vindicare, robustus illi thorax, brachiaque concessa sunt: ut illatam injuriam manu defenderet, et objectu corporis quasi quodam clypeo vindicaret.* [Pag. 296].

born for peace and war, not born with weapons, but with hands by which weapons can be acquired. And we see infants, without teaching, use their hands for weapons. So also Aristotle. [See the passages in the text.]

5 Again, Right Reason and the nature of Society, which are next to be considered, do not prohibit all force, but that only which is

ligi potest locum habiturum; etiamsi dominium (quod nunc ita vocamus) introductum non esset: nam vita, membra, libertas, sic quoque propria cuique essent, ac proinde non sine injuria ab alio impeterentur. Sic et rebus in medio positis uti, et quantum natura desiderat eas absumere, jus esset occupantis: quod jus qui ei eriperet, faceret injuriam: hoc ipsum autem nunc, postquam ex lege aut usu dominium formam suam accepit, multo intelligitur facilius: quod exprimam Tullii

*De Offic. III. 5.* verbis: *Ut si unumquodque membrum sensum suum haberet, ut posse putaret se valere si proximi membri valetudinem ad se traduisset, debilitari et interire totum corpus necesse est: sic, si unusquisque nostrum rapiat ad se commoda aliorum, detrahatque quod cuique possit, emolumenti sui gratia, societas hominum et communitas evertatur necesse est: nam sibi ut quisque malit quod ad usum vitæ pertineat quam alteri acquiri, concessum est non repugnante natura, illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus.*

6 Non est ergo contra societatis naturam sibi prospicere, atque consulere, dum jus alienum non tollatur: ac proinde nec vis, quæ jus alterius non violat, injusta est: quod

*De Offic. I. 11.* idem Cicero ita extulit: *Cum sint duo genera decertandi, unum per disceptationem, alterum per vim, cumque illud*

<sup>2</sup> Locus Berosi refertur a JOSEPHO, *Antiq. Jud. Lib. 1. cap. 2, (cap. vii. § 2).* J. B.

<sup>4</sup> Aut potius veteris Poëta, qui nomen Orphel adsumsit. Exstat fragmentum apud CLEMENTEM ALEXAN-

---

repugnant to Society; that is, that which is used to attack the Rights of others. For Society has for its object, that every one may have what is his own in safety, by the common help and agreement. Which consideration would still have place, even if property were not introduced: for even then, each one would have a property in his life, limbs, liberty; and these could not be attacked without wrong done to him. And also to use things which lay in common, and to take as much of them as nature should require, would be the right of the person who first took occupation of them; and he who should prevent the exercise of this Right, would do the occupier wrong. And this is much more easily understood now, when property has taken a shape by law or usage: as Cicero says. [See the passage in the text.]

6 Therefore it is not contrary to the nature of Society to take care of the future for one's self, so that the Rights of others be not infringed: and thus, even force, which does not violate the Right

*proprium sit hominis, hoc belluarum, confugiendum est ad posterius si uti non licet superiore. Idem alibi: Quid est quod contra vim fieri sine vi possit? Apud Ulpianum est: Vim vi repellere licere Cassius scribit, jus natura comparatur, apparet autem, inquit, ex eo arma armis repellere licere. Ovidius dixerat (De Art. Am. III. 492):*

*Epist. Fam. XII. 3.*

*Lib. I. § 27. vim vi. D. de vi et vi armata.*

Armaque in armatos sumere jura sinunt.

II. 1 Id quod dicimus, non omne bellum juri naturæ adversari, probatur amplius ex sacra historia. Nam cum adversus Reges quatuor, qui Sodoma diripuerant, Abrahamus cum ministris ac fœderatis suis armatus victoriam reportasset, Deus per sacerdotem suum Melchisedecum factum ejus probavit. Ita enim illi Melchisedecus: *Laus erit Deo altissimo, qui tradidit hostes tuos in manum tuam*, Gen. xiv. 20. At ceperat arma Abrahamus, ut ex historia apparet, sine speciali Dei mandato: fretus igitur jure naturæ vir non sanctissimus tantum, sed et sapientissimus, etiam extraneorum <sup>3</sup> Berosi atque <sup>4</sup> Orphei testimonio. Historia septem populorum quos Israelitis excindendos Deus tradidit, non utar: fuit enim ibi mandatum speciale ad exequendam rem a Deo judicatam in populos maximorum criminum reos: unde hæc bella in sacris literis Dei bella proprie nominantur, quippe Dei jussu non humano arbitrio suscepta. Ad rem magis pertinet

DRINUM, *Strom. Lib. v. [p. 723]* et apud TRACTATUM *De Verit. Rel. Christ. Lib. I. EUSEBIUM, Præpar. Evangel. XIII. 12: § 15. et in Matth. v. 31, sub fin. J. B. unde Auctor noster ipse attulit, Not. in*

of another, is not unjust. So Cicero, Ulpian, Ovid. [See the passages.]

II. 1 Our doctrine, that all war is not contrary to Natural Law, is further proved from the sacred history. Abraham made war upon the four kings who had plundered Sodom, and was thereupon blessed by Melchisedec. This he did without the special mandate of God, as appears by the history: he must therefore have been justified by the Law of Nature: for he was a most holy and wise man, as even heathen authors declare. I do not use the history of the seven people, whom God gave up to be rooted out by the Israelites: for the Jews had a special command for thus dealing with people guilty of enormous crimes; whence these wars are in Scripture called the wars of the Lord, as being undertaken by the command of God, and not by the will of man. An example more to the purpose is that in which the Jews, under Moses and Joshua, resisted the attack of the Amalekites:

fecisse, mox tamen subjungit, cum arietes vel boves commisissent, et alter alterum occidisset, Q. Mutio auctore distinguendum, ut si quidem is perisset qui aggressus erat, cessaret actio; si is, qui non provocaverat, competeret actio. Cui explicando serviet illud Plinii: <sup>5</sup> *Leonum feritas inter se non dimicat, serpentum morsus non petunt serpentes; sed si vis inferatur, nulla est cui non sit ira, non sit anima injuriæ impatiens, et prompta, si noceas, ad se defendendum alacritas.*

IV. 1 De jure naturali ergo, quod et gentium dici potest, satis constat eo bella non omnia improbari.

2 Jure autem gentium, voluntario itidem, non damari bella satis nos docent historiæ, et omnium populorum leges ac mores. Imo <sup>6</sup> jure gentium introducta esse bella dixit Hermogenianus: quod paulo aliter quam vulgo accipi solet interpretandum censeo: nempe ut certa bellorum forma a jure gentium sit introducta, quam formam quæ habeant bella, ea peculiare ex jure gentium effectus consequantur: <sup>6</sup> unde

*L. Ex hoc  
Jure S. D. de  
Just. et Jure.*

libro i. cap. iiii. et compara quæ ad præfationem ex Philone posuimus, § 7.

<sup>6</sup> Prima quidem verba istius loci leguntur apud PLINIUM, *Hist. Natur.* Lib. vii. *Præfat.* in fine. Verum reliqua, ab illis, *Sed si vis inferatur, &c.* non ibi exstant, nec alibi, quod sciam,

apud eundem Auctorem. Adeo ut in unum compererit Grotius duo loca diversorum Scriptorum, dum scilicet describit alios, qui ita juncta adferunt: sic enim FRANCIS. CONNANUS, *Comm. Jur. Civ.* Lib. i. cap. iv. num. 8. MARC. LYCKLAMA, *Membran.* Lib. vii.

and in repelling it. Thus Ulpian, after saying that an animal which is devoid of reason cannot commit wrong, still adds, that if rams or bulls fight, Q. Mutius had ruled that a distinction was to be made, and that if the one who had been the aggressor was killed, the action would not lie; but if the one who had given no provocation was killed, the action was good. [The misquotation from Pliny adds nothing to the argument.]

IV. 1 By Natural Law, then, [*Jure naturali* or *Jure gentium*] it is plain that all wars are not condemned.

2 That by the voluntary or instituted Law of nations [see chap. i. § ix. 2] wars are not condemned, we have evidence enough in the histories, laws and customs of all nations. Indeed Hermogenianus has said that wars were introduced *Jure gentium*, by Natural Law: which we are to understand thus: that by the *Jus gentium* a certain form of war was introduced, so that wars which take this form, have, *jure gentium*, certain effects. And hence we have a distinction, of which we shall afterwards make use, into a war formal according to *Jus gentium*,

distinctio nascitur, qua utendum nobis erit infra, in bellum solenne juris gentium, quod et justum, id est plenum, dicitur, et non solenne, quod tamen non ideo justum esse desinit, id est juri congruens. Nam aliis bellis, modo æqua subsistit causa, jus gentium non adssistit quidem, sed nec resistit, ut infra latius explicabitur. *Jure gentium* (inquit Livius) *ita comparatum est, ut arma armis propulsentur.* Et Florentinus jus esse gentium ait, ut vim atque injuriam propulsemus, ut corpus nostrum tuteur.

Lib. III. 3.

Lib. XIII. 41.  
num. 11.L. ut vobis. 3.  
D. de Just.  
et Jure.

V. 1 De jure divino voluntario major est difficultas. Neque hic objiciat quisquam jus naturæ esse immutabile, ac proinde a Deo nihil in contrarium potuisse constitui: id enim verum est in iis, quæ jus naturæ vetat aut præcipit; non in iis, quæ jure naturæ licent tantum: nam quæ ejus sunt generis, cum proprie juris naturæ non sint, sed extra jus naturæ, et vetari possunt et præcipi.

2 Solet ergo primum a nonnullis contra bellum adferri lex data Noæ ejusque posteris, ubi Deus sic loquitur, Gen. ix.

Eclog. XLII. pag. 304. Simile exemplum videbimus infra, ad Lib. II. cap. II. § 13. Nota ult. Auctoris. J. B.

§ *Jure gentium introducta esse bella*] Scriptor vitarum illustrium in Themistocle: *Professus est Athenienses suo consilio, quod communi jure gentium fa-*

*cere possent, Deos publicos suosque patrios ac penates, quo facilius ab hoste possent defendere, muris sepsisse.* [COEN. NEPOS, cap. vii. num. 4].

6 Non videtur de distinctione illa cogitasse Jurisconsultus: sed hoc velle tantum, regulas, quæ in Bello observan-

which is also called a just or legitimate war, a complete war; and informal war, which may still be legitimate or just [in a more general sense,] that is, agreeable to justice. Informal wars, if there be a reasonable cause for them, are not supported by *Jus gentium*, but neither are they resisted by it, as will hereafter be shewn. Livy and Florentinus say that *Jus gentium* directs us to repel force by force. [See the passages.]

V. 1 Concerning Instituted Divine Law [Chap. I. § xv. 1] there is more difficulty. Nor is the objection valid, that Natural Law is immutable, and therefore cannot be changed, even by God: for this is true as to what is commanded or forbidden by Natural Law, but not as to what is only permitted. Things of that kind are not properly under Natural Law, but extraneous to it, and may be forbidden or commanded [by Instituted Law].

2 The first passage usually brought from Scripture, to shew that wars are unlawful, is the law given to Noah (Gen. ix. 5, 6). What is there said, *Your blood of your lives I will require, at the hand of man*

5, 6. *Quin etiam sanguinem vestrum, id est animarum vestrarum, repossam: ab omni bestia repossam eum: atque etiam de manu hominis alterius, utpote fratris, repossam hominis animam. Quisquis effuderit sanguinem hominis, qui est in homine, sanguis ejus effundetur: quia hominem ad effigiem suam fecit Deus.* Hic ergo quidam illud, quod de repossando sanguine dicitur, generalissime intelligunt, et alterum de effundendo vicissim sanguine, comminationem esse volunt, non approbationem: quorum neutrum mihi se persuadet. Nam interdictum de sanguine non effundendo latius non patet quam quod in lege est, *Non occides*; quod neque capitalibus suppliciis, neque bellis obstitisse manifestum est. Lex ergo tam hæc, quam illa, non tam novi aliquid constituit, quam jus naturæ prava consuetudine oblitteratum declarat atque repetit: unde verba illa intelligenda in eo sunt sensu, qui vitium includit: sicut homicidii nomine non quamvis hominis cædem intelligimus, sed destinatam, et innocentis. Quod vero sequitur de sanguine vicissim effundendo, videtur mihi non factum nudum, sed jus continere.

3 Rem ita explico. Natura non iniquum est, ut quantum quisque fecit mali, tantundem patiatur, juxta illud, quod <sup>b</sup>Rhadamanthi jus dicitur:

Ἐἴτε πάθοι τὰ τ' ἔφεξε δίκη καὶ θεῖα γένοιντο.

Quæ fecit si quisque ferat, jus fiet et æquum.

tur, ut justum habeatur, ex præceptis naturalis Rationis constitutas fuisse et inductas. Talibus enim naturalis Rationis dictatis censetur Jus gentium, ex mente veterum. *J. B.*

<sup>b</sup> *Rhadamanthi jus*] Apud *Apollodorum*, Lib. II. Νόμος Ῥαδαμάνθου· ὃς ἀν ἀμύνηται τὸν χειρῶν ἀδικῶν ἀρξαστα δθῶον εἶναι. *Lex Rhadamanthi:*

*si quis se ultus sit de eo, qui prior vim intulerit, impune id ferat.* (Cap. iv. § 9).

<sup>7</sup> Vide *De Legib.* Lib. ix. Tom. II. pag. 864, et seqq. *J. B.*

<sup>1</sup> *Leves fuisse penas*] *Servius* ad primum librum *Æneidos*: (vers. 136): *Luetis: persolvētis. Et hic sermo a pecunia descendit: antiquorum enim penæ omnes pecuniariæ fuerunt.* Et ad li-

*will I require it*, some understood in the most general sense; and what is said afterwards, *Whoso sheddeth man's blood, by man shall his blood be shed*, they regard as a threatening, not an approval. I cannot assent to either opinion. The interdict concerning the shedding of blood is not of wider extent than the command, *Thou shalt not kill*: and this, it is plain, does not prohibit either capital punishment or wars. And the one law, as well as the other, does not constitute any new offence, but only declares and repeats the Natural Law, obliterated by evil custom. Whence the words [*sheddeth man's blood*] are to be under-

Seneca pater hanc sententiam sic retulit: *Justissima patiendi vice, quod quisque alieno excogitavit supplicio, excipit suo.* Ex hujus naturalis æquitatis sensu Cain parricidii sibi conscius dixerat, Gen. iv. 14. *qui inveniet me, interficiet me.* Sed Deus primis illis temporibus aut ob hominum raritatem, aut quia paucis adhuc grassantibus minus opus erat exemplo, id quod naturaliter licitum videbatur edicto repressit, et contactum quidem ac commercium homicidæ defugi voluit, at vitam ei non eripi; quomodo et Plato <sup>7</sup> in legibus constituit, et olim in Græcia usurpatum his versibus docet Euripides: [Orest. v. 511, *seq.*]

Καλῶς ἔθεντο ταῦτα πατέρες οἱ πάλαι  
Εἰς ὀμμάτων μὲν ὄψιν οὐκ εἶων περᾶν,  
Οὐδ' εἰς ἀπάντημ', ὅς τις αἰμ' ἔχων κυρεῖ.  
Φυγαῖσι δ' ὄσειον, ἀνταποκτεῖναι δὲ μή.

Quam bene parentum provida setas statuerat,  
Ut cogeretur de via decedere,  
Hominumque visu cæde patrata nocens,  
Fugaque lueret triste, non letho, scelus!

Quo et illud pertinet Thucydidis: εἰκὸς τοπάλαι τῶν μεγίστων ἀδικημάτων μαλακωτέρας κείσθαι αὐτὰς (τὰς ζημίας), παραβαινομένων δὲ τῷ χρόνῳ εἰς τὸν θάνατον αἱ πολλὰ ἀνήκουσι. *Credibile est antiquitus quamvis gravium delictorum <sup>1</sup> leves fuisse pœnas: sed cum eæ progressu temporis contemnerentur, ventum ad mortem.* Lactantius: <sup>8</sup> *Ad-* Lactant. Lib. II.

brum secundum: (vers. 229). *Expendere: tractum est a pecunia: nam apud majores pecuniarias pœnas constat fuisse, cum adhuc rudi ætate pecunia ponderaretur, quod ad capitis pœnam deinde usurpatum est.* Ad sextum: (vers. 20). *Pendere: tractum est a pecuniaria damnatione.* Memorat Plinius,

*Historia Naturalis*, Lib. VII. cap. lvi: primum capitis judicium in Areopago esse actum.

<sup>8</sup> Locus est *Inst. Div.* cap. 10, num. 23. ubi agitur de Exsulibus, quibus, apud veteres Romanos, igni et aqua interdiceretur. *J. B.*

stood as including criminality in the act: as the word *homicide* does not mean *any* killing of a man, but the intentional killing of an innocent man. What is added, *his blood shall be shed* in turn, appears to me to imply, not the mere fact, but the Law of justice.

<sup>3</sup> My explanation of the matter is this. It is naturally equitable that whatever evil any one has inflicted, the same he shall suffer, according to what is called the Law of Rhadamanthus. So Seneca. Cain, with a sense of this natural equity said (Gen. iv. 14), *Every one that findeth me shall slay me.* In the earliest times, however, for various

*huc enim videbatur nefas, quamvis malos, tamen homines, supplicio capitis afficere.*

4 Ab uno facto illustri sumta conjectura divinæ voluntatis in legem ivit, ita ut Lamechus quoque <sup>k</sup> simili facinore perpetrato impunitatem sibi ab hoc exemplo promiserit, Gen. iv. 24.

5 At cum jam ante diluvium, gigantum ætate, promiscua invaluisse cædium licentia, instaurato post diluvium humano genere, ne mos idem invalesceret, severius occurrendum Deus censuit: et repressa prioris sæculi lenitate, quod naturæ non iniquum esse dictabat, et ipse permisit, <sup>l</sup>ut insons esset, qui homicidam occidisset: quod postea institutis judiciis summas ob causas ad judices solos restrictum est; ita tamen ut moris pristini vestigium manserit in jure ejus, qui occisum sanguine proxime attingeret, etiam post Mosis legem, qua de re infra fusius agetur.

6 Magnum habemus auctorem nostræ interpretationis Abrahamum, qui cum legem Noæ datam non ignoraret, arma sumsit in reges quatuor, ut quæ plane crederet cum ea lege non pugnare. Sic et Moses Amalecitis populum oppugnan-

<sup>k</sup> *Simili facinore perpetrato*] Aut potius, si quid simile perpetrasset: nam hunc sensum ferunt verba quæ apud

Mosem.

<sup>l</sup> *Ut insons esset, qui homicidam occidisset*] Josephus: *ἠρπαινῶ μὲν τοῖ*

reasons, this was not enforced; the manslayer was indeed shunned by men, but not put to death: as Plato directs in his *Laws*: and as Euripides states the usage of Greece in his *Orestes*. So Thucydides; Lactantius.

4 The example of Cain was regarded as establishing a law, so that Lamech (Gen. iv. 24) promised himself impunity, from this example, after the like deed.

5 But since before the deluge, in the age of the giants, violence had become general, when after the deluge, God restored the race of man, he provided by increased severity against the recurrence of the evil: and repressing the lenity of the former time, he gave his permission to that which was naturally equitable, that he who slew a homicide should be blameless. Which afterwards, when tribunals for high crimes were instituted, was confined to the judges. Yet a vestige of the ancient usage remained in the Right of the avenger of blood, even under the Law of Moses, of which we shall hereafter speak.

6 We have a strong confirmation of this interpretation in Abraham, who, though he must have known the law given to Noah, took arms against the four kings. So Moses directed the Israelites to



tibus arma jussit opponi, naturæ scilicet jure usus: nam Deum de hac respectatim consultum non apparet, Exod. xvii. 9. Adde jam, quod capitalia supplicia nec in homicidas tantum, sed et in alios facinorosos usurpata apparet, non modo apud populos extraneos, sed apud ipsos piæ doctrinæ alumnos, Gen. xxxviii. 24.

7 Nimirum conjectura divinæ voluntatis, ipsa naturali ratione adjuvante, a similibus ad similia processerat, ut quod in homicidam constitutum erat, in alios quoque eximie nocentes non iniquum videretur. Sunt enim quædam, quæ vitæ æquiparantur, ut existimatio, pudor virginalis, fides matrimonii, aut sine quibus vita tuta esse non potest, ut imperii societatem continentis reverentia: adversum quæ qui faciunt, ii homicidis meliores non videntur.

8 Huc pertinet vetus, quæ apud Hebræos exstat, traditio, leges plures Noë filiis datas a Deo, quæ non omnes a Mose narratæ sint, quia satis erat ad ipsius institutum, eas postea in lege peculiari Hebræorum esse comprehensas. Sic adversus nuptias incestas legem veterem, quanquam a Mose suo loco non memoratam, exstitisse apparet Levit. xviii. Inter ea

σφαγῆς ἀνθρωπίνης ἀπέχεσθαι καὶ  
καθαρεύειν φόνου καὶ δόσαντὰς τι  
τοιούτου κολάζεσθαι. *Edico ut a cæde*

*humana pure habeantur manus: quod si  
quis cædem commiserit, pœnam ferat.*  
(Lib. i. cap. iii. § 8).

fight against the Amalekites, not specially consulting God on this point. Add to this, that capital punishments are applied not only to homicides, but to other criminals, not only among other nations, but in the chosen people of God. Gen. xxxviii. 24.

7 In fact men had proceeded from like to like, by the light of reason, in their conjecture of the divine will, and had judged that what was the appointed punishment of homicides was equitable also towards other great criminals. For there are things which are to man of no less value than life, as good fame, virginity, conjugal fidelity: and things without which life cannot be safe, as a reverence for the sovereign authority which holds society together: so that those who assail these objects are held as no better than homicides.

8 Connected with this is the tradition extant among the Jews, that there were given by God to the sons of Noah several laws; which are not all recorded by Moses, because it was enough for his purpose to give them afterwards as included in the particular law of the Hebrews. Thus it appears, Lev. xviii. 6, that there was an ancient law against marrying persons near of kin, though no such law

autem, quæ Noæ liberis Deus edixit, hoc quoque aiunt fuisse, ut non homicidia tantum, sed et adulteria, et concubitus incesti, item violentæ rapinæ morte punirentur. Quod ipsum confirmant Jobi verba xxxi. 11.

9 Jam vero data per Mosem lex sanctionibus capitalibus rationes adjicit, quæ apud alios populos non minus quam apud Hebræum populum valent: ut Levit. xviii. 24, 25, 27, 28. Psal. ci. 5. Prov. xx. 8. Et peculiariter de homicidio dicitur terra non posse expiari nisi sanguine homicidæ fuso, Num. xxxv. 31, 33. Præterea absurdum cogitatu est, Hebræo populo indultum, disciplinam et salutem publicam ac singulorum munire pœnis capitalibus, ac se bello tueri, cæteris autem regibus gentibusque idem eodem tempore non licuisse: neque tamen reges eos aut gentes unquam a prophetis admonitos improbari a Deo usum capitalium suppliciorum ac bella omnia, sicut de aliis peccatis admoniti sæpe sunt.

10 Imo contra quis non credat, cum lex Mosis de judiciis expressam habuerit divinæ voluntatis imaginem, recte ac pie facturas fuisse nationes, quæ inde sibi exemplum pete-

\* Vide Auctoris Tractatum *De Verit. Relig. Christ.* Lib. 1. § 15, in *fin.* pag. 28. *J. B.*

<sup>1</sup> Vocem illam *quædam* addidi, quæ excidit in omnibus Editionibus, et quam deesse nemo non videt. *J. B.*

---

is previously mentioned by Moses. And the Jews say that among the laws given to Noah, were precepts that not only homicide, but adultery, incest, and robbery should be punished with death. And this is confirmed by Job, xxxi. 11; *This is an heinous crime: yet it is an iniquity to be punished by the judges.*

9 Moreover the law given by Moses gives reasons for capital punishments, which are valid among other nations as well as the Jews: as Lev. xviii. 24, &c., *Defile not yourselves, &c.* Psal. ci. 5, *Whoso privily slandereth his neighbour, him will I cut off.* Prov. xx. 8, *A king that sitteth in the throne of judgment scattereth away all evil with his eyes.* And especially concerning homicide, it is said, Num. xxxv. 33, that *the land cannot be cleansed of the blood that is shed therein but by the blood of him that shed it.*

Further, it is absurd to suppose that the Hebrew people were indulged with the privilege of protecting public and private interests by capital punishments, and defending themselves by war, and that other kings and nations at that time had no such privilege: and that, this being so, those kings and nations were yet never rebuked by God for the practice of capital punishment and of war, as they were often rebuked for other offences.

rent? quod certe Græcos, Atticos præsertim, fecisse credibile est: unde <sup>9</sup> tanta in jure veteri Attico, et quod inde sumtum est Romano xii. tabularum cum legibus Hebræis similitudo est. Sufficere hæc videntur, ut appareat legem Noë datam non eum habere sensum, quem volunt, qui bella omnia eo argumento impugnant.

VI. 1 Speciem majorem habent quæ ex Evangelio contra bellum adferuntur: in quibus examinandis non illud mihi sumam, quod sumunt multi, in Evangelio extra præcepta credendi et sacramentorum nihil esse quod non sit juris naturalis: id enim, quo sensu a plerisque sumitur, verum non puto.

2 Illud libens agnosco, nihil nobis in Evangelio præcipi, quod non naturalem habeat honestatem: sed non ulterius nos obligari legibus Christi, quam ad ea, ad quæ jus naturæ per se obligat, cur concedam non video. Et qui aliter sentiunt mirum quam sudent, ut probent quædam <sup>1</sup> quæ Evangelio vetantur ipso jure naturæ esse illicita, <sup>m</sup> ut concubinatum, divortium, matrimonium cum pluribus fœminis. Sunt quidem hæc ejusmodi, ut eis abstinere honestius esse dictet ipsa ratio;

<sup>m</sup> *Ut concubinatum, divortium*] Spec-  
tat huc illud Hieronymi: [*Ad Ocean.*  
Tom. 1. p. 198. c.] *Aliæ sunt leges Cæ-*

*saris, aliæ Christi: aliud Papinianus,*  
*aliud Paulus noster præcipit.*

---

10 On the contrary, we must suppose that, as the law of Moses was the expression of the divine Will, the other nations would do well and piously to take example by that law: which it is probable that the Greeks, and especially the Athenians, did: whence arises the so great similarity of the old Attic Law, and the Laws of the Twelve Tribes therefrom derived, with the Laws of the Hebrews.

VI. 1 The arguments adduced against war from the Gospel are more specious: and in examining these, I shall not assume, as many do, that there is in the Gospel nothing, besides the precepts of belief and institution of the sacraments, which is not matter of Natural Law: for that, in the sense in which it is commonly understood, I do not believe.

2 I willingly acknowledge that nothing is commanded us in the Gospel which has not a natural reasonableness: but I do not see why I should grant that we are bound to nothing by the Laws of Christ beyond what we are bound to by the Law of Nature. And when men maintain the contrary, it is wonderful to see what pains they are compelled to take to prove that some things which are forbidden by the Gospel, are also unlawful by the Law of Nature; as concubinage, divorce, plurality of wives. These things are such that reason itself

at non talia ut absque lege divina nefas in illis appareat. Ad illud vero quod Christiana lex præcipit, ut alii pro aliis mortis periculo nos objiciamus, 1 Joh. iii. 16. quis dicat ipso <sup>2</sup> naturæ jure nos obligari? Justini dictum est: τὸ κατὰ φύσιν βιοῦν, οὐδέπω πεπιστευκότος ἐστίν. <sup>3</sup> secundum naturam vivere, ejus est, qui nondum credidit.

3 Sed nè illos quidem sequar, qui aliud sibi sumunt non exiguum, Christum scilicet in tradendis præceptis, quæ extant Matthæi v. et deinceps, interpretem tantum agere legis per Mosem datæ. Aliud enim sonant verba toties repetita, *Audistis dictum fuisse veteribus: Ego vero dico vobis*: quæ oppositio: sed et Syriaca et aliæ versiones ostendunt, illud *veteribus* significare, ad veteres, non a veteribus; ut *vobis* est, ad vos, non a vobis. Veteres autem illi non alii fuerunt, quam qui Mosis tempore vivebant: nam quæ ut veteribus dicta recitantur, non legis peritorum sunt, sed Mosis, aut verbo tenus, aut sensu. *Non occides*, Exod. xx. 13. *Quisquis occiderit, tenebitur judicio*, Levit. xxiv. 21. Num xxxv. 16, 17, 30. *Non mœchaberis*, Exod. xx. 14. *Quisquis dimiserit uxorem, det ei libellum divortii*, Deut. xxiv. 1. *Non pejerabis, sed reddes Domino, quæ juraveris*, Exod. xx. 7.

<sup>2</sup> Quidni? si recte jus illud intelligamus. Vel exemplum Ethnicorum, qui pro patria se morti devoverunt, id refellit. Postulat omnino Societatis custodia, de qua Auctor noster in Prole-

gomenis, ut in certis quibusdam casibus nonnulli plurimorum saluti vitam suam donent. Adeoque ipsa obligatio Martyrii, qualis ab evangelio nobis imponitur, a Lege Naturæ ultimo deduci po-

dictates that it is better to avoid them; but not such that they are seen to be criminal without the divine law.

Again, who can say that such a Precept as that, 1 Joh. iii. 16, We ought to lay down our lives for the brethren: is binding by the Law of Nature? Justin Martyr says that to live according to nature is the condition of him who has not yet come to believe.

3 Nor shall I follow those who make another large assumption, that Christ in delivering the precepts, Matt. v. et sqq. is only speaking as the interpreter of the law given by Moses. For a different notion is suggested by the words so often repeated: *Ye have heard it said by them of old time: But I say unto you*. Where the apposition shews, which the Syriac and other versions express, that *veteribus* rather means *to them of old time* than *by them*; as *vobis* means *to you*, not *by you*. And these men of old time were those who lived at the time of Moses: for what is ascribed to them is not the dogmas of doctors of the law, but the doctrines of Moses, either in words or in

Num. xxx. 2. *Oculum pro oculo, dentem pro dente* (supple, reposcere liceat in iudicio) Levitic. xxiv. 20. Deuteron. xix. 21. *Diliges proximum tuum* (id est Israelitam) Levit. xix. 18. *et odio habebis inimicum tuum*, °puta septem populos, quibuscum amicitiam colere quorumque misereri vetantur, Exod. xxxiv. 11. Deut. vii. 1. His addendi Amalecitiæ, in quos Hebræi iubentur bellum habere implacabile, Exod. xvii. 16. Deut. xxv. 19.

4 Sed ad intelligentiam verborum Christi omnino notandum, legem per Mosem datam dupliciter accipi: aut secundum id, quod commune habet cum aliis legibus, quæ ab hominibus condi solent, quatenus scilicet graviora delicta pœnarum aspectabilium formidine coercet, Hebr. xi. 2. et populum Hebræum hac ratione in statu civilis societatis continet, quo sensu dicitur νόμος ἐντολῆς σαρκικῆς, Hebr. vii. 16. et lex factorum, Rom. iii. 27. aut secundum id, quod legis divinæ est proprium, quatenus scilicet etiam mentis requirit puritatem, et actus aliquos, qui sine temporali pœna omitti possunt: quo sensu vocatur νόμος πνευματικός, Rom. vii. 14. exhilarans animum, Psalm. xix. qui Latinis xviii. 9. Legisperiti et Pharisei priore illa parte contenti, secundam, quæ potior est,

test. J. B.

° *Secundum naturam vivere, ejus est, qui nondum credidit*] Locus Justini est ad Zenam (pag. 389): idemque sensus apud Origenem in excerptis illis, quæ

Philocalia dicuntur. (Cap. ix. pag. 36).

° *Putat septem populos*] In hoc odium lege permitti ait illustrissimus Abarbanel ad Deut. xxiii. 21.

sense: as appears by the examples. *Thou shalt not kill, &c. An eye for an eye, and a tooth for a tooth. Thou shalt love thy neighbour* (the Israelite), *and hate thine enemy*, the seven expelled nations, to whom the Jews were forbidden to shew mercy: to whom are to be added the Amalekites. [See the references.]

4 To the understanding of the words of Christ, it is to be observed that the Law given by Moses is taken in two senses: first, according to that which it has in common with other laws established by men, as restraining grave crimes by visible punishments, and keeping the Hebrew people in a state of civil society; in which sense, by it, *every transgression and disobedience received a just reward*, Heb. ii. 2; and in which sense, Heb. vii. 16, it is called *the law of a carnal commandment*; and Rom. iii. 27, *the law of works*: and secondly, as requiring also purity of mind, and some acts which may be omitted without temporal punishment, in which sense it is called *the spiritual law*, Rom. vii. 14, *rejoicing the heart*, Psalm xix. The Lawyers and Pharisees, con-

2 Quomodo vero? Alibi id explicat Rom. xiii. 4: *Dei minister est tuo bono: quod si feceris quod malum est, metue; non enim frustra gladium gerit: nam Dei minister est, vindex ad iram ei qui quod malum est fecerit.* <sup>3</sup> Jure gladii per complexionem omnis quidem coercitio intelligitur, quomodo etiam apud Jurisconsultos interdum; sed ita tamen, ut pars ejus summa, id est verus gladii usus, non excludatur. Huic loco illustrando non parum servit Psalmus secundus, qui quanquam in Davide suam habuit veritatem, plenius tamen et perfectius ad Christum pertinet: ut discere est Actor. iv. 25; xiii. 33; Hebr. v. 5. Is autem Psalmus reges omnes hortatur, ut Dei filium venerabundi suscipiant: hoc est, ut se ministros ei exhibeant, qua reges sunt scilicet, ut recte explicat Augustinus, cujus verba ad hanc rem pertinentia apponam: *In hoc reges, sicut eis divinitus præcipitur, Deo serviunt, in quantum reges sunt, si in regno suo bona jubeant, mala prohibeant, non solum quæ pertinent ad humanam societatem, verum etiam quæ pertinent ad divinam religionem.* Et alibi: *Quomodo ergo reges Domino serviunt in timore, nisi ea, quæ contra jussa Domini fiunt, religiosa severitate prohibendo atque plectendo? Aliter enim servit qua homo est, aliter qua rex est. Mox: In hoc ergo serviunt Domino reges, in quantum sunt reges, cum ea faciunt ad serviendum illi, quæ non possunt facere nisi reges.*

Contr. Cres.  
Gram. lli. 61.

Ad Rom.  
Epist. 60. cap.  
186. num. 19.

\* Argumentum istud, ut et plura ex sequentibus, per se equidem et directe eo tantum pertinet, ut capitalia supplicia ab Evangelio non tolli probetur: verum per consequentiam hinc deduci

potest, neque bellum omne Christianis vetitum esse. Huc facit non tantum ratio ab Auctore adlata num. 13, istius paragraphi, sed etiam quod usus capitalium suppliciorum non minus videatur

2 But how do kings secure peace and tranquillity to their subjects? This he teaches, Rom. xiii. 4, *He is the minister of God to thee for good, &c.* *The sword* implies all controlling power, as also sometimes among the Jurists; but still, in such a manner that the highest kind of that power, the actual use of the sword, [that is, capital punishment and war,] is not excluded. This place is illustrated by Psalm ii., which though verified in David has a fuller accomplishment in Christ. [See the passages in Acts and Hebrews.] That Psalm exhorts the kings of the earth to *kiss the Son lest he be angry*: that is, to do him service in their capacity of kings. [See the passages quoted from Augustine.]

3 (2) The second passage is, that already partly cited, Rom. xiii. *There is no power but of God. The powers that be are ordained of God, &c.*: whence the apostle infers that we are to obey and honour the

3 Secundum argumentum præbet nobis is ipse locus, ejus partem citavimus, ad Rom. xiii. ubi potestas summa, qualis est regia, a Deo esse dicitur, et Dei ordinatio vocatur; unde infertur, ei et parendum et honorem exhibendum; et quidem ex animo: et qui ei resistit, eum Deo resistere. Si ordinationis voce res intelligeretur, quam Deus tantum non vult impedire, quomodo se Deus habet circa actus vitiosos, jam inde nulla honoris, nulla obedientiæ, ad animum maxime pertinentis, obligatio sequeretur; nec quicquam diceret Apostolus, ubi hanc potestatem tantopere prædicat atque commendat, quod non latrocinii et furtis conveniret. Sequitur ergo, ut ordinata hæc potestas voluntate Dei approbante intelligatur; unde porro infertur, cum Deus sibi contraria non velit, hanc potestatem cum voluntate Dei per Evangelium revelata et omnes homines obligante, non pugnare.

4 Neque eliditur hoc argumentum eo, quod qui in imperiis erant eo tempore cum hæc Paulus scriberet, dicuntur alieni fuisse a Christiana pietate; nam primum id ita universim verum non est. Nam Sergius Paulus Cypri Proprætor Christo nomen pridem dederat, Actor. xiii. 12. ut jam taceam quod de Edessenorum rege vetus fama tradidit, nonnihil forte falso inquinata, sed ut videatur ex vero originem trahere. Deinde non de personis quæritur, an impiæ fuerint, sed an illa functio in illis impia fuerit: quod dicimus ab Apostolo

[Ruseb.  
H. E. I. cap.  
13.]

repugnare mansuetudini et clementiæ Christianæ, quam bellum: unde, si priora tamen licent, posterius illicitum non esse, efficitur. Vide quæ de capitibus supplicis ulterius dicentur infra,

Lib. II. cap. 20. § 12. J. B.

\* Edessenorum] Est Edessa in Osroëne. Nomen Abgari frequens illis locis. Apparet ex nummis, Tacito, Apiano, Dione tum in pridem editis, tum

powers that are ordained; and that, from our hearts; and that he who resisteth the power resisteth the ordinance of God. By ordinance we cannot understand merely what God will not prevent, as he permits bad actions: for such permission would not impose any obligation of honour or heartfelt obedience. On this supposition the Apostle, in speaking so highly of the powers that be, would give a reason which is equally true of thefts and robberies. It follows then that the powers thus ordained, are approved by God; and since God cannot approve contradictory things, that this power is not at variance with the will of God revealed by the Gospel, and obligatory on all men.

4 Nor is this argument refuted by the consideration, that the powers that be in St Paul's time, were not Christian. For in the first place, this is not universally true. Sergius Paulus, the Proprætor

negari, quando illam functionem dicit a Deo institutam etiam pro illo tempore, ac propterea honorandam etiam intra animi recessus, quibus proprie solus Deus imperat. Potuit ergo et Nero, et rex ille Agrippa, quem ad Christi religionem amplectendam Paulus tam serio invitat, Act. xxvi. Christo se subicere, et retinere hic regiam, ille imperatoriam potestatem: quæ sine jure gladii et armorum intelligi nequit. Sicut ergo olim pia erant sacrificia secundum legem, quamvis ab impiis sacerdotibus celebrata; sic 'pia res est imperium, quamvis ab impio teneatur.

## III.

5 Tertium argumentum petitur ex Joannis Baptistæ verbis, qui serio interrogatus a militibus Judæis (cujus gentis multa millia Romanis militasse ex Josepho et aliis scriptoribus manifestissimum est) quid haberent faciendum, ut iram Dei effugerent; non eos militia abire jussit, quod facere debebat si ea erat Dei voluntas, sed abstinere concussionibus et fallaciis, stipendiisque esse contentos, Luc. iii. 14. Ad hæc Baptistæ verba, cum apertam satis militiæ approbationem contineant, multi respondent, quæ Baptista præscripsit ita discre-

in novis excerptis, Capitolino. [Vide III. *tum, Diss. VIII. § 10, pag. 534, et seqq.*  
SPANHEM. *De Præst. et usu Numismatum, Tom. I.*]

of Cyprus, had become a Christian; not to mention the ancient story concerning the king of Edessa, perhaps distorted, but yet with a foundation of truth\*.

But in the next place, the question is not whether the persons were impious, but whether their office was impious; which the Apostle denies, when he says that even at that time it was ordained of God, and therefore was to be honoured from the heart, which is God's peculiar dominion. And thus Nero and king Agrippa might have submitted themselves to Christ, and have retained respectively the imperial and the royal power; which could not have subsisted without the power of the sword and of arms. And thus as under the Old Law, sacrifices were pious, though celebrated by impious priests, so government is a pious office, though it be held by an impious man.

5 (3) The third argument is taken from the words of John the Baptist; who, when he was asked by the Jewish soldiers, (of which nation there were many thousands in the Roman army, as is manifest from Josephus and other writers,) What they should do, to avoid the wrath of God; did not tell them to cease to be soldiers, which he ought to have done if such were the will of God; but told them to abstain from extortion, and to be content with their wages.

\* Barbeyrac remarks that the learned hold the story of Abgarus a 'mera fabula.'



pare a Christi præceptis, ut aliud docere potuerit Baptista, aliud Christus: quod minus admittam, hæc obstant. Joannes et Christus eodem exordio doctrinæ, quam afferbant, summam indicarunt. *Resipiscite: appropinquavit enim regnum cælorum*, Matt. iii. 2; iv. 17. Christus ipse regnum cælestè (id est legem novam: nam legem regni nomine appellare Hebræis mos est) dicit cœpisse invadi a diebus Baptistæ, Matt. xi. 12. Joannes dicitur prædicasse baptismum pœnitentiæ in remissionem peccatorum, Marc. i. 4. Tantundem fecisse dicuntur Apostoli Christi nomine, Actor. ii. 38. Exigit Joannes fructus dignos pœnitentiæ, et iis, qui talem fructum non proferunt, excidium minatur, Matt. iii. 8. et 10. Exigit opera dilectionis supra legem, Luc. iii. 11. Lex dicitur durasse usque ad Joannem, id est, ab illo incepisse doctrina perfectior, Matt. xi. 13. Et principium Evangelii a Joanne ducitur, Marc. i. 1; Luc. i. 77. Ipse Joannes hoc nomine major Prophetis, Matt. xi. 9; Luc. vii. 26. missus scilicet ad dandam cognitionem salutarem populo, Luc. i. 77. ad Evangelium annuntiandum, Luc. iii. 18. Neque usquam Joannes

† *Pia res est imperium, quamvis ab impio teneatur*] Bene hoc exsequitur ad hunc locum epistolæ ad Romanos Chrysostomus.

Since the words of the Baptist contain a manifest approval of a military life, many answer, that the exhortations of the Baptist and the precepts of Christ are widely different; so that the one might teach one thing, the other, another. This I cannot admit; for

John and Christ announced their doctrine in the same manner; *Repent, for the kingdom of heaven is at hand*, Matth. iii. 2; iv. 17. Christ says that the kingdom of heaven, (that is the new law, for it is the Hebrew manner to call a law a kingdom,) is taken by force, from the times of John the Baptist, Matth. xi. 12. John is said to have preached the baptism of repentance for the remission of sins: Mark i. 4. The Apostles are said to have done the same in the name of Christ, Acts ii. 38. John requires fruits worthy of repentance, and threatens them with destruction who do not bring forth such, Matth. iii. 8 and 10. He requires works of love beyond the law, Luke iii. 11; *He that hath two coats, &c.* The law is said to have endured until John, that is, a more perfect doctrine began with him, Matth. xi. 13. The beginning of the Gospel narrative is John: Mark i. 1. Luke i. 77. John was on this account greater than the prophets, Matth. xi. 9, Luke vii. 26; being sent to give knowledge of salvation unto the people, Luke i. 77; and to preach the Gospel, Luke iii. 18. Nor does John anywhere distinguish Jesus from himself by

Jesus a se distinguit præceptorum discrepantia (quanquam quæ generalius et confusius, et rudimentorum more a Joanne sunt indicata, eadem diserte tradidit Christus vera lux) sed eo quod Jesus esset promissus ille Messias, Actor. xix. 4; Joan. i. 29. rex scilicet regni cœlestis, qui daturus esset in se confidentibus vim Spiritus Sancti, Matt. iii. 11; Marc. i. 8; Luc. iii. 16.

IV.

6 Quartum hoc est argumentum, quod mihi ponderis non exigui videtur: Si tollatur jus capitalium suppliciorum, et armis cives tuendi adversus latrones ac prædones, maximam inde secuturum scelerum licentiam et quasi diluvium malorum, "cum nunc quoque constitutis judiciis ægre reprimatur improbitas. Quare si mens Christi fuisset, talem rerum statum, qualis auditus nunquam fuerat, inducere, haud dubie verbis quam maxime disertis ac specialibus edicendum ei fuerat, ne quis de capite judicaret, ne quis arma ferret; quod fecisse nusquam legitur: nam quæ adferuntur, aut valde sunt generalia, aut obscura. Docet autem ipsa æquitas et communis ratio, non tantum verba generalia contrahi, et ambigua commode explicari, sed et a proprietate usuque recepto verborum discedi

▪ *Cum nunc quoque constitutis judiciis ægre reprimatur improbitas] Διδ* τούτους δικαστήρια καὶ νόμοι καὶ τιμωρίαι καὶ διάφοροι κολάσεων τρόποι.

the difference of their precepts, (though what is indicated in a more general and confused and rudimentary manner by John, Christ, the true light, delivers clearly,) but by Jesus being the Messiah that was to come, Acts xix. 4, John i. 29; that is, the king of the kingdom of heaven, who was to give the Holy Spirit to them that believed on him, Matth. iii. 11. Mark i. 8. Luke iii. 16.

6 (4) In the fourth place there is this argument, which appears to me to have no small weight. If the right of inflicting capital punishments, and of defending the citizens by arms against robbers and plunderers, was taken away, then would follow a vast license of crime and a deluge of evils; since even now, while criminal judgments are administered, violence is hardly repressed. Wherefore if the mind of Christ had been to induce such a state of things as never was heard of, undoubtedly he would have set it forth in the clearest and most special words, and would have commanded that none should pronounce a capital sentence, none should wear arms: which we nowhere read that he did: for what is adduced to this effect is either very general or obscure. Equity and common sense teach us that, in order to avoid that sense of passages which would lead to extreme inconveniences, we may limit the range of general terms, and explain ambiguities, and even depart in some degree from the pro-

nonnihil, ut is sensus evitetur, qui maxima secum incommoda sit allaturus.

7 Quintum sit, quod nullo argumento ostendi potest lex Mosis, quæ ad judicia pertinebat, desiisse priusquam urbs Hierosolyma excinderetur, et cum ea tum species tum spes reipublicæ concideret. Nam neque in lege Mosis ullus terminus isti legi præfinitur, neque Christus aut Apostoli usquam de istius legis cessatione loquuntur, nisi quatenus id comprehensum videri potest in reipublicæ (ut diximus) destructione: imo contra Paulus summum pontificem ait constitutum, ut iudicium ferret secundum legem Mosis, Act. xxiii. 3. Christus ipse in præfatione præceptorum suorum ait, non venisse se ad solvendam legem, sed ad implendam, Matt. v. 17. quod quem de ritualibus sensum habeat non obscurum est; implentur enim lineamenta adumbrantia cum perfecta rei species exhibetur: de legibus autem ad judicia pertinentibus quomodo verum esse potest, si Christus, ut quidam existimant, adventu suo ea sustulit? Si autem mansit obligatio legis, quamdiu stetit Hebræorum respublica, sequitur ut Judæi etiam ad

*Propter hos sunt judicia et leges et supplicia, totiusque pœnarum modi.* Chry-

ostomus in sermone ad Patrem fidelium. [Tom. vi. pag. 696].

priety and received use of words.

7 (5) In the fifth place, it cannot be shewn by any argument that the law of Moses concerning the judgments of tribunals ceased to be in force before the city of Jerusalem was destroyed, and with it, the existence and the hope of the Jewish nation ceased. For there is neither in the law of Moses any term appointed for the force of the law, nor do Christ or his Apostles anywhere speak of the cessation of that law, except in so far as such an event may, as we have said, be comprehended in the destruction of the Jewish state: on the contrary, Paul says that the high priest was appointed to judge persons according to the law, Acts xxiii. 3. Christ himself, in the preface to his precepts says, that he was not come to destroy the law, but to fulfil it, Matth. v. 17. Now in what sense this is to be understood of the Ritual Law, is plain enough; for the lineaments which shadow out an object are fulfilled when the perfect form of the thing is exhibited. But how can this be true of the Judicial Law, if Christ, as some hold, took it away by his coming? But if the obligation of the Law remained as long as the Jewish state continued, it follows that Jews, even though converted to Christianity, if they were summoned before a magistrate, could not refuse, and ought not to judge otherwise than Moses had commanded.

Christum conversi, si ad magistratum vocarentur, eum defugere <sup>4</sup> non potuerint, et ut judicare non aliter debuerint quam Moses præscripserat.

8 Ego sane omnia expendens ne levissimam quidem conjecturam reperio, qua motus vir aliquis pius illa tunc Christi loquentis verba audiens, aliter existimare potuerit. Illud agnosco, ante Christi tempus quædam fuisse permissa, sive quoad impunitatem externam, sive etiam quoad animi puritatem (nunc enim ista distinctius exquirere, nec opus, nec otium est) quæ Christus suam disciplinam sectantibus licere noluit, ut ob qualemcumque offensam uxorem dimittere, ab eo qui læserit in judicio exigere ultionem: sed inter Christi præcepta et illas permissiones est diversitas quædam, non est repugnantia. Nam qui uxorem retinet, qui ultionem sibi privatim debitam remittit, nihil facit contra legem; imo hoc facit, quod lex maxime vult. Longe aliud est in judice, cui lex non permittet, sed imperat ut homicidam morte puniat, reus ipse futurus apud Deum ni fecerit. Huic si Christus interdicit, ne homicidam morte puniat, omnino contrarium legi præcipit, solvit legem.

VI.

9 Sextum sit argumentum ab exemplo Cornelii Cen-

<sup>4</sup> Scilicet ea de causa, quod morte alias quis tenebatur Magistratum de-  
damnandi forent Rei. Neque enim latum omnino suscipere. Vide Notam

---

8 Weighing the whole case, I do not see the slightest reason for thinking that any pious men, at that time hearing the words of Christ, could think otherwise. I acknowledge that before the time of Christ some things were permitted, either as matters of impunity, or as not destroying purity of mind, (a distinction which we need not dwell upon here,) which Christ did not permit to his followers; as, to put away a wife for every cause, to sue one at law for satisfaction; but between the precepts of Christ and those permissions, there is a diversity, not a repugnance. For he who does not put away his wife, or who remits a satisfaction due to him, does nothing against the law: on the contrary, he conforms to the Law, in the highest degree. But the case of a judge is altogether different; for to him the Law does not permit, but commands him to punish the homicide with death; and he himself is guilty before God if he does not do this. And if Christ forbids him to punish the homicide with death, he commands what is altogether contrary to the Law; he destroys the Law.

9 (6) The sixth argument shall be from the example of Cornelius the Centurion, who both received from Christ the Holy Ghost, the undoubted sign of justification, and was baptized in the name of Christ by the apostle Peter: but we do not read that he gave up the mili-

turionis, qui et Spiritum sanctum, signum indubitatum justificationis, a Christo accepit, et in nomen Christi a Petro Apostolo baptizatus est: militiam autem abdicasse, aut ad eam abdicandam a Petro monitus non legitur. Sunt qui respondeant, cum de religione Christiana a Petro sit institutus, simul censeri debere institutum de militia deserenda. Hi, si quidem certum esset atque indubitatum inter Christi præcepta contineri interdictum militiæ, aliquid dicerent. Sed cum id nusquam alibi diserte exstet, certe de ea re aliquid hoc saltem loco, qui id maxime posebat, dicendum fuerat, ne post ventura ætas officii sui regulas ignoraret. Neque vero solet Lucas, ubi personarum qualitas specialem quandam vitæ mutationem desiderabat, id silentio præterire, ut videre est tum alibi, tum Actor. xix. 19.

10 Septimum huic simile petitur ex eo, quod de Sergio Paulo cœpimus dicere. Nam in ejus conversi historia nullum est indicium ejurati magistratus aut admonitionis factæ ut ejuraretur. Quod autem non narratur, cum narrari, ut diximus, maxime attineat, id nec factum censendum est.

VII.

11 Octavum esse potest, quod <sup>x</sup>Paulus Apostolus, intel-

VIII.

Gallicam in h. l. J. B.

<sup>x</sup> Paulus Apostolus, intellectis Judæ-

orum in se insidiis] Utitur hujus loci auctoritate Concilium Africanum: [cap.

tary life, nor was exhorted by Peter to do so.

Some reply that when he was instructed by Peter in the Christian religion, he was also instructed of the unchristian character of his military life. This would be to the purpose, if there were any plain and certain interdiction of a military life in the precepts of Christ. But when there is nowhere such a thing in any clear form, it was plainly necessary that something should have been said on the subject in this place, where it was specially required; in order that the ages to come might not be ignorant of the rules of its duty. And that Luke, when conversion led to any special change in the occupation of the converts, did not omit to state it, we see elsewhere, Acts xix. 19, *Many of them also which used curious arts brought their books, &c.*

10 (7) A seventh argument of a like kind we draw from what is said of Sergius Paulus, as already partly noticed. For in the history of that convert there is no indication of his having abdicated the office of magistrate, or having been admonished to abdicate. Now what is not narrated, when, as we have said, it was highly important that it should be narrated, must be supposed not to have happened.

11 (8) An eighth argument is, that the Apostle Paul, when he was apprized of the Jews lying in wait for him, directed the fact to be

lectis Judæorum in se insidiis, Tribuno indicari eas voluit; et cum Tribunus milites ei addidisset, quorum præsidio in itinere adversus vim omnem tutus esset, nihil contradixit, neque Tribunum aut milites monuit, Deo non placere, ut vis vi repelatur. Atqui is erat Paulus, qui nullam occasionem edocendi officii aut omitteret ipse, aut omitti ab aliis vellet, 2 Timoth. iv. 2.

IX.

12 Nonum accedat, quod rei honestæ ac debitæ finis proprius non potest non esse honestus ac debitus. Tributa ut solvamus honestum est, atque etiam præceptum conscientiam obligans, ut Paulus Apostolus explicat: tributorum autem <sup>5</sup>finis est, ut potestates publicæ habeant unde sumtum faciant ad bonos tuendos, ac coercendos malos, Rom. xiii. 3, 4, 6. Tacitus apposite ad hanc rem: *Neque quies gentium sine armis, neque arma sine stipendiis, neque stipendia sine tributis haberi queunt.* Cui dicto simile est Augustini illud: *Ad hoc tributa præstamus, ut propter necessaria militi stipendium præbeat.*

Hist. iv. 74.

Contr. Faust.  
xxii. 74.

93, pag. 253. *Cod. Canon. Eccles. Afric.* 1615]. *Quorum contra furorem possimus non insolita, nec a Scripturis aliena impetrare præsidia, quando Apostolus Paulus, sicut in Apostolorum actibus fidelibus notum est, factiosorum conspirationem militari etiam submovit auxilio. Utitur et sæpe Augustinus, ut Epist. l.*

quæ est ad Bonifacium: *epistola* CLIV. ad Publicolam, ubi hæc: *Neque si in illa arma scelerati homines incidissent, Paulus in effusione sanguinis eorum suum crimen agnosceret.* Idem *Epistola* CLXIV. *Paulus egit, ut sibi tuitio etiam armorum daretur.* [Quæ *Epist.* est LXXVII. edit. *Benedictin. Epist.* autem L. est

made known to the captain, and when the captain had furnished soldiers, as a guard for him in his journey, he made no opposition, and did not warn the captain or the soldiers that it was displeasing to God to repel force by force. And yet Paul was one who neither omitted nor allowed others to omit any occasion of teaching men their duty, 2 Tim. iv. 2.

12 (9) A ninth argument is, that if a thing be good and right, the end to which it tends cannot be otherwise than good and right. Now to pay taxes is right, and is a thing even binding on the conscience, as the Apostle Paul explains: but the end to which taxes are subservient, [that is, one end among others,] is that the government may be able to maintain forces for the purpose of defending good citizens and restraining bad men, Rom. xiii. 3, 4, 6. Tacitus and Augustine both make this remark. [See the text.]

13 (10) We have a tenth argument from Acts xxv. 11, where Paul says, *If I be an offender, or have committed anything worthy of death, I refuse not to die.* Whence I collect Paul to have been of the opinion, that even after the publication of the Gospel-law, there are some

13 Decimum argumentum præbet locus ille Actor. xv. 11, ubi Paulus ita loquitur : *Si injuria quemquam affecti, et dignum aliquid morte commisi, non recuso mori.* Unde colligo, ita censuisse Paulum, etiam post publicatam Evangelii legem quædam esse crimina, quæ morte plecti æquitas ferat, aut etiam exigat: quod et Petrus docet, 1 Epist. ii. 19, 20. Quod si ea tum fuisset Dei voluntas, ut capitalibus judiciis absteretur, potuerat quidem purgare se Paulus, sed non debuerat in hominum animis eam relinquere opinionem, quasi capite plectere nocentes nunc non minus quam olim liceret. Probato autem capitales pœnas post Christi adventum recte exerceri, simul probatum arbitror, bellum aliquod licite geri, puta adversus nocentes multos et armatos: qui ut rei fiant, acie vincendi sunt. Vires enim et resistentia nocentum, sicut in prudenti deliberatione suum habere momentum potest, ita de jure ipso nihil imminuit.

14 Undecimum sit, quod in Apocalypsis prophetia prædi-

XI.

CLXXXIV. et Ep. CLIV. est XLVII.]

\* Hic, scilicet, inter alios, quos Auctor minime excludit, ut inepte hoc nomine eam carpunt quidam Interpretes. J. B.

† Non recuso mori] Sic et Act. xviii. 18: *quia nulla in me erat mortis causa.* Justinus *Apologetico* II. κολά-

ζεσθαι δὲ τοὺς οὐκ ἀκολουθῶντας τοῖς διδάγμασιν αὐτοῦ βιοῦντας, λεγομένων δὲ μόνων Χριστιανῶν, καὶ ὑφ' ἑμῶν, ἀξιοῦμεν. *Ut autem puniantur, qui non convenienter præceptis illius vivunt, et nomine solo sunt Christiani, et quidem a vobis, et nos optamus.* [pag. 50].

crimes which equity allows, or even requires, to be punished with death; which also Peter teaches, 1 Epist. ii. 19, 20, *If when ye be buffeted for your faults ye shall take it patiently.* If the will of God had then been that there should no longer be capital punishments, Paul might have cleared himself indeed; but he ought not to have left men to think that then, no less than previously, it was lawful to put criminals to death. But when we have proved that capital punishment may lawfully be practised after the coming of Christ, we have also proved, as I conceive, that war may be made lawfully, for example against an armed multitude of evildoers: who must be overcome in battle that they may be dealt with by justice\*. For the power and the number of the evildoers, though it may have its weight in prudential deliberation, does not affect the question of what is right.

14 (11) An eleventh argument is, that in the Revelation, wars of

\* We may however remark that to treat the army of an enemy as a body of evildoers, is not the true view of war, nor necessary to its justification. War is a relation between two States; and the Right of making war is a necessary Right of a State. See *Elements of Morality*, 775.

cuntur bella quædam piorum cum manifesta approbatione, xviii. 6, et alibi.

XII.

15 Duodecimum esse potest, quod Christi lex solam legem Mosis, qua gentes ab Hebræis separabat, sustulit, Ephes. ii. 14. Quæ autem natura, et bene moratarum gentium consensu honesta censentur, adeo non sustulit, ut sub generali præcepto omnis honesti ac virtutis comprehenderit, (Phil. iv. 8; 1 Cor. xi. 13, 14.) Jam vero criminum poena et arma, quæ injuriam arcent, natura habentur laudabilia, et ad justitiæ, et ad beneficentiæ virtutem referuntur. Atque hic obiter notandus eorum est error, qui Israelitarum jus ad bellum deducunt ex eo solo, quod terram Cananæam illis Deus dedisset. Est enim hæc justa quidem causa, sed non unica. Nam et ante ea tempora pii rationis ductu bella gesserunt: et ipsi Israelitæ postea aliis de causis, ut David ob legatos violatos. Tum vero quæ humano jure quisque possi-

\* *Vaticinium Esaiæ*] Id de pace, quæ orbi contigit beneficio Romani imperii, interpretatur Chrysostomus Oratione Christum esse Deum: καὶ ὅτι οὐ παγία ἐστὶ μόνον καὶ ἀκίνητος καὶ ἀβράγης, ἀλλὰ καὶ πολλὴν πρωτανύσει τῇ οἰκουμένην εἰρήνην, καὶ αἱ μὲν κατὰ πόλεις πολυαρχίαι καταλυθήσονται, καὶ αἱ μοναρχίαι, μία δὲ τις ἔσται βασιλεία εἰς πάντας ἀρθείσα, καὶ τὸ πλεον αὐτῆς ἐν εἰρήνῃ ἔσται, οὐ καθὰ περ ἔμπροσθεν. τὸ μὲν παλαιὸν χειροτέχναι πάντες καὶ ῥήτορες ὄπλα ἐτίθεντο καὶ ἐπὶ παρατάξεως ἐστήκα-

σαν. τοῦ Χριστοῦ δὲ παραγενομένου πάντα ἐκεῖνα διελύθη καὶ εἰς μέρος διαρισμένον τὰ τῶν πολέμων περιέστη. Neque vero predictum tantum est, *stabilem fore, immotam, atque inconcussam hanc religionem, sed cum ea adventuram orbi pacem, desituras illis in singulis civitatibus plurium potentias, regnaque ipsa et unum fore super omnes imperium, ac ejus pleraque pacem habitura, contra quam ante fiebat, olim enim et opifices, et oratores induebant arma, consistebant in acie. Post Christi vero adventum cessavit mos iste, et ad definitum homi-*

the righteous against the wicked are predicted with manifest approval, xviii. 6, and elsewhere.

15 (12) A twelfth argument may be this: that the law of Christ took away only the law of Moses in so far as it separated the Gentiles from the Jews: Ephes. ii. 14. But such things as are reckoned good by nature and the assent of the most civilized nations, it was so far from taking away, that it comprehends them under the general precept of all virtue, everything of good report, Phil. iv. 8. 1 Cor. xi. 13, 14. Now the punishment of criminals, and defensive war, are held praiseworthy by their nature, and come under the virtues of justice and well-doing.

And hence, in passing, we may note the error of those who deduce the right of the Israelites to make war from the fact alone, that God had given them the land of Canaan. That indeed was a just cause,



det, non minus ejus sunt, quam si Deus donasset: id autem jus per Evangelium non tollitur.

VIII. Videamus nunc etiam quibus argumentis se fulciat adversaria sententia, quo facilius judicet pius æstimator utra præponderent.

I. Primum adferri solet <sup>a</sup>vaticinium Esaiæ, qui futurum dicit, ut populi gladios contendant in ligones, et lanceas in falces; neque gladium sumant alius in alium, neque bellum ultra addiscant, ii. 4. Sed hoc vaticinium aut sub conditione quadam accipiendum est, quemadmodum multa alia; ut nimirum intelligamus talem fore rerum statum, <sup>a</sup>si omnes populi Christi legem suscipiant atque impleant; quam ad rem Deus nihil sua ex parte passurus sit desiderari: certum autem est, si omnes sint Christiani, et Christiane vivant, nulla fore bella: quod Arnobius ita enuntiat: *Si omnes omnino, qui homines esse se non specie corporum, sed rationis intelligunt*

I.

Adv. Gentes.  
i. cap. 6.

num ordinem redacti sunt actus bellici. Habes sensum plane eundem apud Eusebium de *Preparatione*, Lib. i. c. 4.

<sup>a</sup> *Si omnes populi Christi legem suscipiant atque impleant*] Nam de Christianis Justinus: οὐ πολεμοῦμεν τοῖς ἐχθροῖς, non pugnamus in hostes. [*Apolo- log.* ii. pag. 60 in fin. ed. Sylb. ubi legitur, τοὺς ἐχθροῦς]. Plane ut de Essenis Philo in oratione Omnem bonum esse liberum: (pag. 877, A.) βελῶν, ἢ ἀκόντων, ἢ ξιφιδίων, κράνους, ἢ θάρακος, ἢ ἀσπίδος οὐδένα παρ' αὐτοῖς ἂν εὔροις δημιουργόν ἢ ὀπλοποιόν, ἢ μηχανοποιόν.

Nullum inter eos reperias, qui aut jacula aut sagittas aut gladium aut galeam aut loricaam aut scutum fabricet, nullum qui aut arma conficiat, aut machinas. Simile est quod Chrysostomus ait I ad Corinth. xiii. 3: *Si esset inter homines qualis oportet dilectio, nullas fore pœnas capitales.* [Οὔτε γὰρ νόμων, οὔτε δικαστηρίων ἔδει, οὐ κολάσεων, οὐ τιμωριῶν, οὐκ ἄλλου τῶν τοιοῦτων οὐδενός. εἰ γὰρ ἅπαντες ἠγάπων, καὶ ἠγαπῶντο, οὐδὲν ἂν ἠδίκησεν οὐδεὶς, etc. Tom. III. pag. 454].

but not the only cause. For before that time pious men, acting by the light of reason, had made war; and the Israelites themselves did so for other causes, as David, for the insult done to his ambassadors. For the possessions which any one has by human right are his no less than if God had given him them: and this right is not taken away by the Gospel.

VIII. Let us now see what arguments are offered in support of the opposite opinion, that the pious reader, judging fairly, may see which side preponderates.

I (1) First, it is usual to adduce the prophecy of Isaiah, ii. 4; that the people shall beat their swords into plowshares, and their spears into pruning-hooks; that nation shall not lift up sword against nation, neither shall they learn war any more. But either this prophecy is to be received conditionally, like many others;—namely, that we are

*potestate, salutaribus ejus pacificisque decretis aurem vellent commodare paulisper, et non fastu et supercilio tumidi suis potius sensibus quam illius commonitionibus crederent, universus jamdudum orbis mitiora in opera conversus usibus ferri, tranquillitate in mollissima degeret, et in concordiam salutarem incorruptis fœderum sanctionibus conveniret.*

Insc. Dto. I.  
18. n. 16.

Lactantius vero hoc modo: *Quid fiet, si omnes in concordiam consenserint? quod certe fieri poterit, si pernicioso et impio furore projecto innocentes ac justis esse velint? Aut intelligendum est pure; quo modo si accipiat, docet res ipsa impletum hoc nondum esse, sed implementum ejus, ut et conversionis generalis Judæorum, adhuc expectandum. Utrovis autem modo sumas, nihil hinc inferri potest adversus bellorum justitiam, quamdiu sunt qui pacis amantes pace frui non sinunt, sed vim eis intentant.*

2 Ex quinto Matthæi capite plura argumenta depromi solent, ad quorum dijudicationem opus est animo repeti, quod paulo ante diximus: si Christo id fuisset propositum, omnia capitalia judicia, et jus bellorum tollere, facturum id fuisse

<sup>b</sup> *Quod Græci vertunt τῷ ἀδικούντι*] Ut et Lucas in Stephani oratione: ὁ ἀδικῶν τὸν πλησίον. (Act. vii. 27).

<sup>c</sup> Confer heic Auctoris *Epist.* 1057.

1. Part. J. B.

<sup>c</sup> *Dimitte illi etiam pallium*] Id ita

exponit Cyprianus de bono Patientiæ: *Ut tua ablata non repetas.* (pag. 216). Irenæus, Lib. iv. cap. xxvii: (xiii.) *Tolenti tibi tunicam, remitte ei et pallium: sed non quasi nolentes fraudari contristemur, sed quasi volentes donaverimus,*

to understand that this would be the state of things, if all nations should receive and fulfil the law of Christ; to which end God declares that nothing is wanting on his part. For it is certain that if all be Christians, and live as Christians, there will be no wars: as Arnobius and Lactantius remark. [See the text.]

Or it may be understood absolutely; in which case the facts shew that it is not yet fulfilled, and that its fulfilment, like the conversion of the Jews, is still to be looked for. But in whichever way you take it, nothing can be inferred from it against the justice of wars; so long as there are persons who do not allow the lovers of peace to live in peace, but use force against them.

2 From the fifth chapter of Matthew, many arguments are usually drawn; and in order to estimate the value of these, we must repeat what has been said already; That if the intention of Christ had been to take away all capital punishment, and the right of making war, he would have done this in the most express and special words, in consideration of the magnitude and novelty of the thing: and all the

verbis quam maxime expressis ac specialibus, ob rei magnitudinem ac novitatem; eoque magis, quod nemo Judæus aliter cogitare poterat, quam leges Mosis ad judicia et rempublicam pertinentes vim suam in homines Judæos habere debere, quamdiu staret illa respublica. Hac ergo de re præmoniti locorum singulorum vim ordine exploremus.

3 Adversariæ ergo sententiæ munimentum secundum ex istis verbis petitur: *Audistis dictum fuisse, Oculum pro oculo, et dentem pro dente. Ego vero dico vobis, ne obsistite injurioso*, (ϣϞϞ<sup>b</sup> quod Græci vertunt τῶ ἀδικούντι, Exod. xi. 13.) *sed cœdenti te in dexteram maxillam, alteram quoque obverte.* Hinc enim inferunt quidam, nullam injuriam aut repellendam, aut vindicandam, sive publice, sive privatim. <sup>c</sup>Atqui non hoc dicunt verba: neque enim magistratus hic alloquitur Christus, sed eos, qui impetuntur; nec de quavis agit injuria, sed de tali, qualis est alapa: sequentia enim verba restringunt præcedentium generalitatem.

4 Sic in præcepto sequente: *Qui velit tecum litigare, ut tunicam accipiat, <sup>c</sup>dimitte illi etiam pallium*: non omnis

*gaudeamus. Et si quis te, inquit, angariaverit mille passus, vade cum eo alia duo, ut non quasi servus sequaris, sed quasi liber præcedas.* Etiam Libanius, qui Evangelia legerat, laudat non litigantes de chlamyde et tunica, in

oratione de custodia reorum. Hieronymus dialogo i. adversus Pelagium: *Docet Evangelium ei, qui nobiscum velit judicio contendere, et per lites et jurgia auferre tunicam, etiam pallium esse concedendum.* (Tom. II. pag. 274 c).

more on that account, that no Jew could think otherwise than that the laws of Moses which concerned the Jewish State and tribunals were to retain their authority over Jews, as long as the State existed. With this previous remark, let us consider in order the force of the particular passages.

3 (2) The second argument then in favour of the opposite opinion is taken from these words: *Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: but I say unto you, that ye resist not the evil man: but whosoever shall smite thee on thy right cheek, turn to him the other also.* Hence some infer that no injury is to be resisted or satisfaction for it to be required, either publicly or privately. But this is not what the words say: for Christ is not here addressing magistrates, but those who are assailed: nor does he speak of wrongs of all kinds, but of such as a blow on the cheek; for the subsequent words restrict the generality of the preceding.

4 So in the following precept, *If any man will sue thee at law, and take away thy coat, let him have thy cloke also*: it is not every appeal

II.

provocatio ad judicem aut arbitrum prohibetur, Paulo interprete, qui lites non omnes prohibet, 1 Cor. vi. 4. sed vetat Christianos in prophanis auditoriis inter se litigare, idque ad Judæorum exemplum, apud quos recepta erat sententia, *Qui adducit negotia Israelitica ad extraneos, polluit nomen Dei*: sed vult Christus ad exercendam patientiam nostram, de rebus, quæ facile sunt recuperabiles, ut tunica, aut cum tunica, si opus sit, pallium, non contendi judicio, sed quamvis optimo jure nitamur, omitti juris persecutionem. Apollonius Tyanæus negabat, philosophi esse *περὶ χρυσίου διαφέρεσθαι*, de pecuniola litigare. *Non improbat prætor* (inquit Ulpianus) *factum ejus qui tanti habuit re carere, ne propter eam sæpius litigaret. Hæc enim verecunda cogitatio ejus, qui lites exsecratur, non est vituperanda.* Quod hic probari a probis ait Ulpianus, hoc Christus imperat, ex rebus honestissimis et probatissimis deligens præceptorum suorum materiam. At non hinc recte colligas etiam parenti, etiam tutori nefas fore, id sine quo liberi, sine quo pupilli sustentari nequeant, si cogatur, apud judicem defendere. Aliud enim

Philostr. xi.  
15.

L. Item et. 4.  
§ 1. D. de  
alien. jud.  
mut. causa  
sua.

<sup>d</sup> *Ut et patientia, et benignitas omnibus innotescat*] Justinus *Apogetico* 11: *περὶ δὲ τοῦ ἀνεξικákου εἶναι καὶ ὑπηρετικὸς πᾶσι καὶ ἀοργήτους, ἃ ἔφη ταῦτά ἐστι.* *Quæ dicit, huc pertinent, ut adversus omnes simus patientes, offi-*

*ciosi, minime iracundi.* (pag. 49).

<sup>e</sup> *Petenti abs te dato*] Justinus *Apogetico* eodem: *εἰς δὲ τὸ κοινωνεῖν τοῖς δεομένοις καὶ μηδὲν πρὸς δόξαν ποιεῖν, ταῦτα ἔφη παντὶ τῷ αἰτοῦντι δίδοτε, &c.* (pag. 48). *De commu-*

to a judge or an umpire which is forbidden, according to the interpretation of Paul, who does not forbid men having matters at law, 1 Cor. vi. 4: only he forbids the Christians to go to law before the heathen tribunals: and this he does by the example of the Jews, among whom this maxim was current; He who refers the concerns of the Israelites to the judgment of strangers, pollutes the name of God: but Christ, in order to exercise our patience, directs us that with regard to matters which may easily be replaced, as our coat, or if need be, our cloke along with our coat, we should not contend at law; but though our right be indisputable, abstain from prosecuting it judicially. Apollonius Tyanæus said that a philosopher ought not to quarrel about paltry pelf. Ulpian says, *The prætor does not disapprove the act of him who thought it a good thing to have nothing, that he might have nothing to go to law about.* For this temperate notion of those who hate lawsuits is not to be condemned. What Ulpian here says is approved by good men, is what Christ makes his command, choosing the matter of his precepts from the most approved and becoming examples. But you cannot infer from this that even a parent or a guardian is not to

est tunica et pallium, aliud totum illud unde vivitur. In Clementis Constitutionibus de homine Christiano dicitur, si litem habeat, *σπουδαζέτω διαλύεσθαι, κἄν δέη βλαφθῆναι τι, det operam, ut transigat, etiamsi quid damni accipiendum sit.* Lib. I. 48. Quod ergo de moralibus dici solet, hic quoque locum habet, non consistere hæc in puncto, sed habere suam quandam latitudinem.

5 Sic in eo, quod deinceps sequitur, *Qui angariabit te ad milliare unum, abi cum eo duo*: non dixit Dominus de centum milliariibus, quod iter hominem a suis negotiis longius abduceret, sed de uno, et, si ita usu veniat, de duobus; quæ deambulatio quasi pro nihilo ducitur. Sensus ergo est, in his, quæ nobis non multum sunt incommodatura, non urgendum nobis esse jus nostrum, sed cedendum plus etiam quam alter postulet, <sup>d</sup>ut et patientia, et benignitas nostra omnibus innotescat.

6 Sequitur porro: *°Petenti abs te dato, et volentem a te mutuo sumere, ne rejice.* Si in infinitum hoc producas, nihil durius. Qui domesticorum curam non agit, infideli est

*nicandis vero facultatibus nostris cum egentibus, et ne quid ad gloriam aucupandam faciamus, hæc dixit: omni petenti date, etc. Alibi: παρρη δεομένων κοινωνούντες, communicantes nostra om-*

*ni egentibus.* (pag. 47). Cyprianus Testimoniorum, Lib. III. i. *Nemini negandam eleemosynam; item illic: omni poscenti te dato, et ab eo, qui voluerit mutuari, ne adversatus fueris.*

defend before the judge, if he be compelled, the means of subsistence of a child or a ward. A coat and a cloke are one thing, but the necessary means of subsistence another. In the Clementine Constitutions it is said of a Christian, *If he have a lawsuit, let him try to bring it to an end, even if he have thereby to suffer loss.* What is commonly said of moral rules applies here also, that right dealing does not lie in a point, but has a certain appropriate latitude.

5 So in what follows, *Whosoever will impose service as for one mile, go with him two*: our Lord does not speak of a hundred miles, a distance that would carry a man quite away from his business, but of one, and if need be, two; which is a trifling amount of walking. The meaning then is this; That in matters which are not very inconvenient to us, we are not to insist upon our right, but to give up even more than is asked, that our patience and kindness may appear to all.

6 It is added, *Give to him that asketh thee, and from him that would borrow of thee turn not thou away.* If you carry this to an indefinite extent, nothing can be more harsh. He who does not care for his own is worse than an infidel, says St Paul, 1 Tim. v. 8. Let us then follow

deterior, inquit Paulus, 1 Tim. v. 8. Sequamur ergo eundem Paulum, optimum legis herilis interpretem, qui Corinthios excitans ad beneficentiam in Hierosolymitanos exercendam, *Non, inquit, ut aliis sit laxamentum, vobis res angustæ, sed ut æquabiliter vestra copia succurrat illorum inopiæ*, 2 Cor. viii. 13. Id est (Livii verba in re non dissimili usurpabo) ut ex eo, quod adfuit opibus vestris, sustineatis necessitates aliorum: qui sensus est et in Cyro Xenophontis: ἂν ἴδω περισσὰ ὄντα τῶν ἐμοὶ ἀρκοῦντων, τούτοις τὰς ἐνδείας τῶν φίλων ἐξακοῦμαι. Similem æquitatem adhibeamus interpretando præcepto, quod jam a nobis recitatum est.

7 Lex Hebræa sicut divortii libertatem indulgebat, ut sævitæ maritorum in uxores occurreret: ita etiam privatæ ultioni, ad quam gens illa valde prona erat, coercendæ, jus læso fecerat ab eo qui læserat, non manu sua, sed apud judicem exigere talionem: quod lex etiam xii. tabularum secuta est; *Si membrum rupit, talio esto*. Christus vero majoris patientiæ magister tantum abest, ut illam in jam læso probet vindictæ flagitationem, injurias quasdam ne arceri quidem vult, aut vi, aut judicio. At quales injurias? tolerabiles scilicet, non quod non in atrocioribus quoque laudabile hoc sit, sed quod restrictiore quadam patientia contentus sit. Ideo exem-

<sup>f</sup> *Vestra copia succurrat illorum inopiæ*] Seneca de beneficiis secundo: *Dabo egenti, sed ut ipse non egeam*. (Cap. 15). Chrysostomus in locum ad Corinthios hic productum: ὁ Θεὸς τὰ κατὰ δύναμιν ἀπαιτεῖ, καὶ καθ' ὃ ἔχει

τις, οὐ καθ' ὃ οὐκ ἔχει. *Deus pro facultate poscit, quatenus habet quis, non quatenus non habet*. Quod ut recte intelligatur, accedant sequentia: ἐπαινεῖ μὲν τοὺς ὑπὲρ δύναμιν, οὐκ ἀναγκάζει δὲ τούτους ποιῆσαι ταῦτό. *Laudat*

Paul, the best interpreter of his master's law, who, when exciting the Corinthians to beneficence towards those of Jerusalem, says, 2 Cor. viii. 13, *Not that other men may be eased and ye burdened, but that your abundance may be a supply for their want*. The like expressions are used by heathen authors, as Livy, Xenophon. [See the text.]

7 As the Hebrew law allowed a liberty of divorce, to moderate the harshness of men towards their wives; so to restrain private revenge to which the nation was very prone, the law allowed the injured man to require from the injurer compensation or satisfaction, not with his own hand, but before the judge. This was followed in the law of the Twelve Tables, which authorized retaliation. But Christ, a teacher of a better patience, is so far from approving the injured man who demands such satisfaction, that he will have some injuries not even

plum posuit in alapa, quæ non vitam impetit, non corpus mutilat, sed tantum contemptum quendam nostri significat, qui nos nihilo deteriores facit. Seneca, libro de constantia sapientis, injuriam a contumelia dividit: *Prior illa, inquit, natura gravior est: hæc levior et tantum delicatis gravis, qua non læduntur, sed offenduntur. Tanta est animorum dissolutio et vanitas, ut quidam nihil acerbius putent. Sic invenias servum, qui flagellis quam colaphis cædi malit.* Idem alio loco: *Contumelia est minor injuria, quam queri magis quam esse sequi possumus, quam leges quoque nulla dignam vindicta putaverunt.* Sic apud Pacuvium quidam: *Patior facile injuriam, si est vacua a contumelia.* Et apud Cæcilium alius:

Cap. 4.

Ibid. 10.

Peribœa,  
apud Non.  
Marcell. p.  
430.

Fallacia, lb.

Facile ærumnam ferre possim, si inde abest injuria;  
Etiamque injuriam, nisi contra constat contumelia;

Demosthenes: *οὐδὲ γὰρ τὸ τύπτεσθαι τοῖς ἐλευθέροις δεινόν, καίπερ ὄν δεινόν, ἀλλὰ τὸ ἐφ' ὕβρει.* *Nec enim tam grave hominibus ingenuis verberari, quamquam et hoc grave, quam per contumeliam verberari.* Is quem dixi Seneca paulo inferius ex contumelia dolorem, affectum esse ait, quem humilitas animi moveat contrahentis se ob factum dictumve inhonorificum.

Cap. 10.

8 In tali ergo circumstantia patientiam Christus præcipit:

*quidem quod facultates exsuperat, (nempe in Thessalonicensibus) sed hos (Achaeos scilicet) non cogit idem facere.* [Tom. III. p. 641].

<sup>7</sup> *Non quod non in atrocioribus quoque laudabile hoc sit* Vide Chrysosto-

mum dicto jam loco.

<sup>8</sup> Locus est in Oratione *Adversus Avidiam*, pag. 395. B. Refertur et fusiuss, a Saturnino, Lib. 16. § 6. D. *De Pœnis*. J. B.

repelled either by force or judicially. But what injuries? Such as are tolerable: not that the same course of action may not be laudable in more atrocious attacks: but because he contents himself with a patience within certain limits. And thus he takes as his example a blow on the cheek, which does not endanger the life or maim the body, but only expresses a contempt which does us no harm.

In like manner Seneca, Pacuvius, Cæcilius, Demosthenes, distinguish between contumely and injury. [See the text.] And Seneca says that the pain of contumely is the feeling of the humiliated mind recoiling from an act or deed which assails our honour.

8 In such circumstances Christ commands patience: and that he may not be met by the common objection that *By bearing one injury you incite another*, he adds, that we are rather to bear a second injury

et ne quis tritum illud objiciat, <sup>9</sup> *Veterem ferendo injuriam invitas novam*: addit, <sup>8</sup> potius etiam ferendam esse alteram injuriam, quam propulsandam priorem: quia scilicet <sup>b</sup> nihil inde ad nos mali pervenit, nisi quod in stulta persuasione positum est. Maxillam obvertere in Hebraismo est patienter ferre, ut apparet Esai. l. 6; Jerem. iii. 3: <sup>1</sup> *præbere os contumeliis*, dixit Tacitus Historiarum tertio <sup>1</sup>.

III.

9 Tertium argumentum peti solet ex eo, quod apud Mat-thæum sequitur: *Audistis dictum fuisse, Diliges proximum tuum, et odio habebis inimicum tuum: Ego vero dico vobis, Diligite inimicos vestros, benedicite eis, qui vos execrantur, precamini pro eis, qui infesti vobis sunt et vos persequuntur*. Sunt enim qui existimant cum tali dilectione et beneficentia adversum inimicos et infestos pugnare tum judicia capitalia, tum bella. Sed facile id refellitur, si ipsum illud legis Hebraicæ dictum consideremus. Præcipiebatur Hebræis, ut

<sup>9</sup> *E. Publio Syro, referente AULO GELLIO, Noct. Attic. xvii. 14. J. B.*

<sup>8</sup> *Potius ferendam esse alteram injuriam*] Chrysostomus vii. ad Romanos: *αὕτη γὰρ ἡ λαμπρὰ νίκη, τὸ πλείον αὐτῷ παρασχεῖν ἂν βούλεται, καὶ τοῦτε ὄρουσ τῆς πονηρᾶς ἐπιθυμίας αὐτοῦ τῇ δαψιλείᾳ τῆς οικείας ὑπερβῆναι μακροθυμίας. Hæc egregia victoria plus illi largiri quam velit, et fines improbæ in illo libidinis liberalitate propriæ patientiæ transcendere.* [Tom. III. pag. 98].

<sup>b</sup> *Nihil inde ad nos mali pervenit, nisi quod in stulta persuasione positum est*] Chrysostomus de Statuis prima: [Immo secunda. pag. 471. Tom. vi.] *ὑβρις οὐκ ἀπὸ γνώμης τῶν ὑβρίζοντων, ἀλλ' ἀπὸ τῆς διαθέσεως τῶν πασχόντων ἢ συνίσταται, ἢ ἀπόλλυται. Contumeliæ non ab inferentis animo; sed ex judicio eorum, qui patiuntur, aut fit, aut perit.*

<sup>1</sup> *Præbere os contumeliis*] Præbere os, eo sensu et apud Terentium est

than to repel the first; since we thereby receive no evil except what has its seat in a foolish persuasion.

To give the cheek to the smiter, is a Hebraism implying to bear patiently, as appears, Isaiah l. 6, Jerem. iii. 3. Tacitus uses a similar expression.

9 (3) A third argument is usually drawn from that which follows in St Matthew, *Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy; But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them that despitefully use you, and persecute you*. There are who think that such love to enemies and assailants is inconsistent both with capital punishments and with war.

But this is easily refuted if we consider this precept of the Hebrew law more nearly. The Hebrews were commanded to love their neighbour, that is, the Hebrew; for so the word *neighbour* is there taken, as we see, Levit. xix. 17, *Thou shalt not hate thy brother in thy heart:*



proximum diligenter, <sup>2</sup>Hebræum scilicet: ita enim vocem proximi ibi sumi ostendit Levit. xix. comma 17, collatum cum commate 18. At non eo minus imperatum erat magistratibus occidere homicidas, et alios graviter sotes: non eo minus tribus undecim ob delictum atrox justo bello persecutæ sunt tribum Benjamiticam, Jud. xx. non eo minus recte David, qui prælia Domini præliabatur, regnum sibi promissum ab Isboseto armis repetit.

10 Sit ergo nunc porrecta latius proximi significatio ad homines quosvis: omnes enim in communem gratiam sunt recepti: nulli populi a Deo devoti: licebit tamen in omnes quod tunc in Israelitas licuit, qui diligere æque tunc jubebantur, ut nunc quisvis homines. Quod si etiam velis in Evangelica lege majorem dilectionis gradum imperari, consedatur et hoc, dum illud quoque constet, <sup>k</sup>non omnes æqualiter diligendos, sed magis patrem, quam extraneum. Sic etiam bonum innocentis

*Adelphis.* (Act. II. Sc. II. vers. 7).

<sup>1</sup> Apud Auctorem illum est: Mox ut præberi ora contumeliis. Cap. 31. Et os offerre contumeliis. Cap. 85. num. 6. Lib. III. Hist. indicati. Sic et LIVIUS dixit: *Desisse postremo præbere ad contumeliam os.* Lib. IV. cap. 35, num. 10. que jam animadverto partim observata a Clar. Clerico, in Matth. v. 39. Adde CICERO. I. *Ep. ad Attic.* 18. pag. 145. *Orat. pro S. Rosc. Amer.* cap. 49, pag. 205. et in *Verr.* III. 16,

pag. 32. *J. B.*

<sup>2</sup> *Hebræum scilicet* Cui par proselytus: leges autem de non nocendo etiam ad incolas illos incircumcisos, de quibus actum cap. 1, § xvi. porrigebantur. Ita Thalmudici.

<sup>k</sup> *Non omnes æqualiter diligendos* Tertullianus *adversus Marcionem* IV: (Cap. 16). *Secundus gradus bonitatis est in extraneos: in proximos primus.* Hieronymus *adversus Pelagium*, dialogo 1: *Præceptum est mihi, ut diligam ini-*

*thou shalt in anywise rebuke thy neighbour; compared with verse 18, Thou shalt not avenge nor bear any grudge against the children of thy people, but thou shalt love thy neighbour as thyself.* But notwithstanding this, the magistrate was commanded to put to death the manslayer and other great criminals: notwithstanding this, the eleven tribes justly made war upon the tribe of Benjamin for a heinous crime, Judg. xx.: notwithstanding this, David who fought the battles of the Lord, rightly won by arms from Ishbosheth the kingdom promised to him. [2 Sam. iii. 1.]

10 Let it be granted then that the word *neighbour* is now to be extended more widely so as to include all men: for all nations are now received under one common rule of grace; no people is cut off from God; still there will be the same permission for all nations which there then was for the Israelites, who were then commanded mutual love, as all men now are.

But if you allege that a greater degree of love is enjoined in the

bono nocentis, bonum commune privato antehabendum ordinatæ dilectionis lege. Ex dilectione autem innocentium nata sunt et judicia capitalia, et pia bella. Vide sententiam moralem, quæ extat Prov. xxiv. 11. Debent ergo Christi præcepta de singulis diligendis atque adjuvandis ita impleri, nisi major ac justior dilectio impediatur. Notum est dictum vetus: <sup>1</sup> *Tam omnibus parcere crudelitas est, quam nulli.*

11 Adde, quod inimicos diligere jubemur Dei exemplo, qui malis solem suum oriri facit. At idem Deus de quibusdam malis et in hac vita pœnas sumit, et olim sumet gravissimas. Quo argumento simul solvuntur ea, quæ de lenitate Christianis præcepta ad hanc rem adferri solent. Nam Deus lenis, misericors, longanimis appellatur Jonæ iv. 2; Exod. xxxiv. 6. At <sup>2</sup> ejusdem in contumaces iram, hoc est, puniendi voluntatem,

*micos, et orem pro persecutoribus. Numquid justum est ut ita diligam, quasi proximos et consanguineos, ut inter amulum et necessarium nulla distinctio sit?* (Tom. II. pag. 274. c).

<sup>1</sup> *Tam omnibus parcere crudelitas est, quam nulli* Verba sunt Senecæ I. de Clementia, cap. 11. Chrysostomus I. ad Cor. iii. 12, et sequentibus, de pœnis humanis agens: οὐδὲ ἀνθρώποι εὐμότητι ταῦτα πράττουσιν, ἀλλὰ φιλανθρωπία· non ex sævitia, sed ex bonitate talia faciunt omnes. (Tom. III. pag. 297). Augustinus: (ep. LIV. ad Mace-

donium). *Sicut est aliquando misericordia puniens, ita et crudelitas parcens.* Imperatores, Valentinianus, Theodosius, et Arcadius, in lege Tertia, Codice Theodosiano, de defensoribus civitatum: *Removeantur patrocinia, quæ favorem reis et auxilium scelerosis impertiendo maturari scelera fecerunt.* Totilas apud Procopium Gothicorum 11: [Immo Lib. III. cap. 8]. τὸ τε ἐξαμαρτάνειν καὶ τὸ διακωλύειν τὴν εἰς τοὺς ἡμαρτηκότητας τιμωρίαν, οἶμαι, ἐν ἴσῳ ἐστίν. *Peccare et prohibere pœnas peccantium in pari pono.* Vide quæ dicen-

Gospel-law, this also may be conceded, provided we make this reserve, that all are not to be loved equally, but, for example, a father more than a stranger: and thus, the good of the innocent is to be preferred to the good of the guilty, public good to private good. Now capital punishments and just wars arise from our love of the innocent. See Prov. xxiv. 11, *If thou forbear to deliver them that are drawn unto death, and those that are ready to be slain, &c.* And thus the precepts of Christ respecting loving and helping all are to be fulfilled in such a way that a greater and juster love do not interfere. There is a noted ancient saying, *It is as great a cruelty to be indulgent to all as to none.*

11 Add that we are commanded to love our enemies by the example of God, who makes his sun to rise on the unjust. Yet the same God punishes some evil deeds in this life, and will hereafter punish them in the heaviest manner. And the same argument solves what is said on this subject about the injunction to Christians to be merciful. For God

passim describunt sacræ literæ, Num. xiv. 18; Rom. ii. 8. Et hujus iræ minister constitutus est Magistratus, Rom. xiii. 4. Moses ab eximia lenitate prædicatur: at idem pœnas de sontibus exegit, etiam capitales. Christi lenitatem et patientiam imitari passim jubemur. At <sup>m</sup>Christus est qui et Judæos inobedientes suppliciis affectis gravissimis, Matt. xxii. 7. et impios in die judicii pro meritis est damnaturus. Magistri lenitatem imitati sunt Apostoli, qui tamen <sup>n</sup>potestate sibi divinitus data usi sunt ad pœnam facinorosorum, 1 Cor. iv. 21; v. 5; 1 Tim. i. 20.

12 Quartus locus qui objicitur est Rom. xii. 17. *Nemini malum pro malo reddite: procurate honesta in omnium conspectu: si fieri potest, quantum in vobis est, cum omnibus hominibus in pace viventes, non vosmetipsos <sup>o</sup>ulciscetes,*

IV.

tur Lib. 11, cap. xxi. § 2.

<sup>n</sup> *Ejusdem in contumaces iram*] Vide hæc de re Cyrillum libro v. contra Julianum. (Pag. 173, seqq.)

<sup>m</sup> *Christus est qui Judæos inobedientes suppliciis affectis gravissimis*] Adde loca Matth. xxi. 41; Lucæ xix. 12, 14, 27. Chrysostomus ad Rom. xiv. narratis malis Hierosolymorum: (Tom. III. pag. 206). *ὅτι δὲ Χριστὸς αὐτοὺς ταῦτα εἰργάσατο, ἀκουσον αὐτοῦ τοῦτο προλέγοντος καὶ διὰ παραβολῶν, καὶ σαφῶς, καὶ διαρρήθην. Christum esse qui hæc fecerit, audi ipsum prædicentem, tum per*

*parabolas, tum aperte et exerte.* Similia habet oratione secunda adversus Judæos.

<sup>n</sup> *Potestate sibi divinitus data usi sunt*] Chrysostomus 1 Cor. iv. 21. *δυνάμει καὶ πνεύμα αὐστηρότητος. Interficiam, mutilabo? est enim ut lenitatis ita et severitatis spiritus.* [Tom. III. pag. 321.] Vide et Augustinum *de sermonibus Domini in monte*, lib. 1. et alios, quos citat Gratianus Caus. xxiii. quæst. viii.

<sup>o</sup> *Ulciscetes*] Vulgata interpretatio in hoc loco habet *defendentes*. Sed ea

is called merciful, gracious, longsuffering, Jonah iv. 2, Exod. xxxiv. 6; and yet Scripture everywhere speaks of his wrath, that is, of his intention to punish, in reference to the rebellious, Num. xiv. 18, Rom. ii. 8. And of this wrath, the magistrate is constituted minister, Rom. xiii. 4. Moses is praised for his extreme gentleness; yet Moses inflicted punishment, even capital punishment, on the guilty. We are everywhere commanded to imitate the gentleness and patience of Christ. Yet Christ it was who inflicted the most severe punishment on the disobedient Jews; Matth. xxii. 7. [In the parable, *He destroyed those murderers, and burnt up their city.*] The Apostles imitated the gentleness of their master; and yet they used their divinely-given power for the punishment of evil-doers: 1 Cor. iv. 21, *Shall I come unto you with a rod?* v. 5, *To deliver such a one unto Satan for the destruction of the flesh;* 1 Tim. i. 20, *Whom I have delivered unto Satan.*

12 (4) The fourth passage which is objected is Rom. xii. 17, *Recompense no man evil for evil, &c.* But here too the same answer as

*dilecti, sed date locum iræ: scriptum est enim; Meum est ulcisci: ego rependam, dicit Dominus. Itaque si esurit inimicus tuus, ciba eum; si sitit, da ei potum: hoc enim si feceris, carbones ignis coacervabis in caput ejus. Ne victor a malo, sed vince bono malum.* Sed hic quoque eadem, quæ ad locum superiorem patet responsio. Nam quo tempore dictum fuerat a Deo, Meum est ulcisci, ego rependam; eo ipso tempore et judicia capitalia exercebantur, et de bellis scriptæ erant leges. Quin et beneficia inimicis (popularibus scilicet) exhiberi jubentur, Exod. xxiii. 4, 5. Hæc tamen, ut diximus, neque pœnis capitalibus, neque bellis justis in ipsos etiam Israelitas obstabant. Quare ne nunc quidem verba eadem, aut præcepta similia, quamvis latius patentia, in talem sensum rapienda sunt: eoque minus quia capitum sectiones non ab Apostolis sunt, aut eorum ætate, sed multo serius factæ ad dividendam lectionem et faciliorem locorum allegationem. Quare quod nunc xiii. caput inchoat, *Omnis*

vox sæpe a Christianis in ulciscendi sensu posita invenitur. Tertullianus de *Patientia*: (Cap. x.) *Jam si levius defendaris, insanies: si uberius, oneraberis. Quid mihi cum ultione, cujus modum regere non possum per impatientiam doloris?* Adversus Marcionem, ii.: *non enim injuriæ mutuo exercendæ licentiam sapit, sed in totum cohibendæ violentiæ prospicit, ut quia durissimo et infideli in Deum populo longum vel*

*etiam incredibile videretur a Deo expectare defensam, edicendam postea per Prophetam, Mihi defensam, et ego defendam, dicit Dominus: interim commissio injuriæ metu vicis statim occurrentis repastinaretur: et licentia retributionis prohibitio esset provocationis; ut sic improbitas astuta cessaret, dum secunda permissa, prima terretur; et prima deterrita, nec secunda committitur, quæ et alias faciliior timor talionis per*

above is evidently applicable. For at the very time at which God said, [as here quoted by St Paul,] *Vengeance is mine, I will repay,* [Deut. xxxii. 35] capital punishments were practised and laws concerning war were given. So again they are commanded to do good to their enemies, Exod. xxiii. 5: *If thou meet thine enemy's ox or his ass going astray, &c.* (that is, among their fellow-citizens;) and yet this did not prevent, as we have said, either capital punishments, or wars among the Israelites themselves. And therefore the same words, or similar precepts, though at present having a wider application, are not now to be wrested to such a sense. And this the less, because the division of chapters, as we now have it, was not made by the Apostles, nor in their age, but much later for convenience of reading and reference: and therefore what now begins chapter xiii. *Let every soul be subject to the higher powers,* and what follows, must be taken in connexion with the precepts against recompensing evil for evil.

*anima potestatibus supereminentibus subjecta esto, et quæ sequuntur, cum illis de ultione non expetenda præceptis cohæsit.*

13 In hac autem dissertatione dicit Paulus, potestates publicas Dei ministras esse, et vindices ad iram (id est ad pœnam) in maleficos: eo ipso apertissime distinguens inter ultionem publici boni causa, quæ Dei vice exigitur, et ad ultionem Deo reservatam referenda est; et illam explendi doloris, quam paulo ante interdixerat. Nam si ultionem etiam illam, quæ boni publici causa exigitur, in illo interdicto comprehensam velis, quid erat absurdius, quam cum dixisset abstinendum a pœnis capitalibus, deinde subjicere, in hoc potestates publicas a Deo constitutas, ut pœnas vice Dei exigant?

14 Quintus quo nonnulli utuntur locus est 2 Cor. x. 3. *Quaquam in carne ambulantes, nequaquam carnis bella gerimus. Nam arma militiæ nostræ non sunt carnalia,*

V.

*eundem saporem passionis. Nihil amarum quam id ipsum pati, quod feceris aliis. (Cap. 18). De Monogamia: Alia diluvium iniquitates provocaverunt, semel defensa qualescumque fuerunt, non tamen septuagies septies, quod duo matrimonia meruerunt. (Cap. 4). Locum Pauli, de quo hic sermo, non male explicat Augustinus epistola CLIV: Hinc autem dictum est, non resistamus malo, ne nos vindicta delectet, quæ alieno malo*

*animum pascit. Vide quæ infra Lib. 11. cap. xx. § v. et x.*

¶ *Non sunt carnalia*] Chrysostomus hoc loco: ἄπλα σαρκικά intelligit πλοῦτον, δόξαν, δυναστείαν, εὐγλωττίαν, δεινότητα, περιδρομάς, κολακείας, ὑποκρίσεις. *Opes, gloriam, potentatum, eloquentiam, solertiam, pensationes, assentationes, fallacias.* [Tom. III. pag. 658].

13 In this part of his teaching, St Paul says that the public authorities are the ministers of God, and revengers to execute wrath (that is to inflict punishment,) upon evil-doers. And thus he already distinguishes between punishment for the sake of the public good, which the magistrate inflicts in the place of God, and which is to be referred to the vengeance reserved to God; and the vengeance of the passion of revenge, which he had before interdicted. For if that punishment which is inflicted for the sake of the public good is to be comprehended in that interdict, what would be more absurd than, that when he had said that capital punishments are not to be inflicted, he should add, in this the public powers are ordained by God, to require punishment in God's place?

14 (5) A fifth passage alleged by some is 2 Cor. x. 3, *For though we walk after the flesh, we do not war after the flesh; for the weapons of our warfare are not carnal, &c.* But this passage is nothing to

*sed divinitus valida ad destructionem munitio* ; et quæ sequuntur. Sed hic locus nihil ad rem facit. Ostendunt enim tum præcedentia, tum quæ sequuntur, carnis nomine a Paulo ibi intelligi imbecillam corporis conditionem, qualis in aspectum veniebat, et cujus nomine contemnebatur. Huic opponit Paulus arma sua, potestatum scilicet sibi ut Apostolo datam ad coercendos refractarios, quali usus fuerat in Elymam, Corinthium incesti reum, Hymenæum et Alexandrum. Hanc ergo potestatem negat esse carnalem, id est, infirmam, imo contra, validissimam eam esse asserit. Quid hoc ad jus capitalium suppliciorum, aut belli? Imo contra, quia Ecclesia eo tempore publicarum potestatem auxilio destituebatur, ideo ad ejus tutelam prodigiosam illam potestatem Deus excitaverat, quæ deficere ferme cœpit, ex quo Imperatores Christiani Ecclesiæ contigerunt, sicut Manna defecit ubi in terras frugiferas populus Hebræorum pervenerat.

VI. 15 Qui sexto affertur locus Eph. vi. 12. *Induite universam illam armaturam Dei, ut possitis stare adversus artes diaboli; quia non est vobis lucta adversus sanguinem*

<sup>4</sup> Exempli gratia, Lib. vii. pag. 300; Lib. xiv. pag. 656; Lib. xv. pag. 713, et alibi. *J. B.*

<sup>5</sup> *Innocentissime agere eas gentes, quarum victus est simplicissimus* ] Dicit idem Philo *de Vita Contemplatrice*, (pag. 292. A. B.) citans Homeri illud (*Iliad.* xiii. 6): *Γλακροφάγων ἀβίωντε δικαιοτάτων ἀνθρώπων.*

Lacedæmonum inopumque hominum justissima quæ gens.

Justinus *de Scythis*, (Lib. ii. c. 2): *Aurum et argentum non perinde ut reliqui*

*mortales appetunt.* Mox: *Hæc continentia morum quoque illis justitiam indidit nihil alienum concupiscentibus; quippe ibidem divitiarum cupido est, ubi et usus.* Et de Scythis in eandem sententiam locus lectu dignus apud Gregoriam, Lib. ii. Taxiles Alexandro: *τι θεῖ πολέμων καὶ μάχη ἡμῖν, Ἀλέξανδρε, πρὸς ἀλλήλους, εἰ μήτε ὑδωρ ἀφαιρησόμενος ἡμῶν ἀφίξας, μήτε τροφήν ἀναγκαίαν, ὑπὲρ ὧν μόνων ἀνάγκη διαμάχεσθαι νοῦν ἔχουσιν ἀν-*

the purpose. For both what precedes and what follows shews that St Paul intends by the term *flesh* the weak condition of his own body, as it appeared to the eye, and on account of which he was despised. To this he puts in opposition his weapons, that is, the power given him to coerce the refractory, such as he had used against Elymas, the incestuous person at Corinth, Hymenæus and Alexander. This is the power which he says is not carnal, that is, weak, but on the contrary, most mighty. What has this to do with the right of capital punishment or of war? Rather on the contrary, because the Church at that time was destitute of the aid of the public authorities, therefore God had raised up for its defence that miraculous power; and this accordingly began to fail as soon as there were given to the Church Chris-

et carnem (supple, tantum, more Hebræo) sed adversus imperia, et quæ sequuntur: agit de pugna quæ Christianorum est qua sunt Christiani, non quam communem habere cum aliis hominibus certis eventibus possunt.

16 Jacobi locus, qui septimo affertur, iv. 1: *Unde bella et pugnae inter vos? nonne ex voluptatibus vestris, quæ militant in membris vestris? Concupiscitis et non habetis: invidetis et affectatis, nec potestis nancisci: pugnatu et bella geritis, nec obtinetis, eo quod non petitis: Petit et non accipitis, eo quod male petitis, ut in voluptates vestras absumatis: nihil continet universale: tantum dicit bella et pugnas, quibus tum Hebræi dispersi inter se misere collidebantur (cujus historię partem aliquam apud Josephum videre est) ortum habuisse ex causis non probis: quod nunc etiam contingere scimus et dolemus. Sensum ab hoc Jacobi loco non alienum habet Tibulli illud (1 Eleg. xi. 7, 8):*

Divitis hoc vitium est auri, nec bella fuere,  
Faginus adstabat cum scyphus ante dapes.

Et apud Strabonem non uno loco notatum videas, inno-

θραίτοις; [Apud Plutarchum, in Alex. p. 698. A. Tom. I.] *Quid inter nos, Alexander, bellis et præliis opus, quando neque ut aquam, neque ut victum necessarium a nobis auferas huc venisti, pro quibus solis pugnare est hominum ratione utentium? Diogenis dictum huc pertinent: οἱ γὰρ ἐκ τῶν μαζοφάγων οἱ κλέπτει καὶ οἱ πολεμιοί, non enim ex his, qui potentiam edunt, aut vires existunt, aut bellorum anctores. Porphyrius, Lib. II. de non Edendis Animalibus: τὸ*

*εὐδάπανον καὶ εὐπορον πρὸς συνήχῃ εὐσίβειαν συντελεῖ καὶ τῶν ἀπάντων, quicquid parata facile est et levis sumptus, ad pietatem perpetuam et quidem omnium confert. [Locus exstat pag. 146, ubi in fine legitur, καὶ πρὸς τὸν ἀπάντων. Ex eodem autem Auctore petendum est dictum præcedens Diogenis, Lib. :. p. 94, idque eo lubentius observari, quia locus ille, ut quidam alii, diligenter diligentiam, non tantum ΣΤΑΒΙΛΗ, s. His Philosophica Angliæ edita, sec. 1780]*

VII.

Antiq. xviii.  
12. seu ultim.  
et Lib. seq.

tian Emperors; as the manna failed when the Jews came into a land that bore fruit.

15 (6) The passage adduced from Eph. vi. 12. *For we wrestle not against flesh and blood, (emphatic usage, but) against principalities, &c. : videtur in hoc versu Christiani habere in communi cum aliis hominibus, ut in aliis locis, quibus non habent in communi cum aliis hominibus.*

16 (7) The passage of St James which is adduced in the text, place, iv. 1, *Whence are wars and fightings among you, &c. nothing universal. It only says that the wars are not universal, by which the Hebrews were then universal, pag. 12.*

centissime agere eas gentes, quarum victus est simplicissimus. Non abeunt hinc ista Lucani (*Phars.* iv. 373, et seqq.):

O prodiga rerum

Luxuries, nunquam parvo contenta parata,  
Et quascitorum terra pelagoque ciborum  
Ambitiosa fames, et laetæ gloria mensæ!  
Discite quam parvo liceat producere vitam,  
Et quantum natura petat. Non erigit ægros  
Nobilis ignoto diffusus Consule Bacchus,  
Non auro myrrhaque hîbunt; sed gurgite puro  
Vita redit: satis est popalis fluviusque Ceresque.  
Heu miseri, qui bella gerunt.

p. 1002. n. Cui adjungi potest Plutarchi illud in Stoicorum contradic-

Eroditissimi illius Interpretis Latini, GODEFRIDI OLEARIJ, cujus immaturus obitus hanc exiguum damnus Reip. literariæ addidit. In loco Homeri, (ut hoc etiam addam) τὸ Ἀβίω, nomen est Populi, e veteribus Scythiis; quod prima observavit Eroditissima matrona, Anna T. Fabri filia, in Notis ad versionem suam Gallicam. J. B.]

Alind ex voluptatum cupiditate, aliud ex avaritia, aliud ex honorum aut imperii nimio studio constat] Verissimam, sed parum meditatam hominibus sententiam, multis egregiis veterum expressam verbis, quid nocerit et aliorum dictis non minus efficacibus confirmare? Athenæus Philosophus apud Diogenem Laërtium, (Lib. x. § 2):

Ἀνθρώποι μοχθῶντι τὰ χεῖρονα καὶ διὰ φόβου

Ἀπλοστον νεύουσιν ἄρχεσι καὶ πολέμοις.

In mala sudatis miseri: sine fine cupido

Vos agit in rixas bellaque præcipites.

Fabianus Papius in controversiis Senecæ patris, (Lib. II. Contr. ix.): *Ecce instructi exercitus, sæpe civium cognatorumque, conserturi manus, constiterunt, et colles equis utrinque complentur, et subinde omnis regio trucidatorum corporibus consternitur, illorum multitudinem cadaverum, vel spoliantium. Si quaesierit aliquis, que causa hominem adversus hominem in facinus coëgit? nam neque feris inter se bella sunt: nec, si*

*ferent, eadem hominem decerant, placidam proximamque divino genus. Que tanta vos fert ira, cum una stirps idemque sanguis sitis? vel que furie in mutuum sanguinem egere? quod tantum malum humano generi vel forte vel fato insectum? an ut concivias poculis extruantur, et tecta auro fulgeant, patriicidium tanti fuit? Magna enimvero et laudanda sunt, propter que mensam et lacunaria sua potius quam lucem innocentes intueri mauerint. An, ne quid ventri negetur libidinique, orbis servitium expetendum est? quid tandem sic pestiferæ istæ divitiæ expetuntur, si ne in hoc quidem ut liberis relinquuntur? Philo ad Decalogum, (pag. 765): χρημάτων ἔρωσι, ἢ γυναικὸς, ἢ δόξης, ἢ τινοῦ ἄλλου τῶν ἡδονῶν ἀπεργαζομένων, ἀρὰ γε μικρῶν καὶ τῶν τυχόντων αἰτίος γίνεσθαι κακῶν; οὐ δὲ διὰ τοῦτο συγγένεια μὲν ἀλλοτριοῦνται, τῆν φυσικὴν εὐνοίαν μεθαρμοζόμενα πρὸς ἀνήκεστον ἔχθραν. χῶραι δὲ μεγάλαι καὶ πολυάνθρωποι στάσασιν ἐμφυλίοις ἐρημοῦνται· γῆ δὲ καὶ θάλαττα πληροῦνται τῶν κεκαυοῦρημένων αἰεὶ συμφορῶν, ναυμαχίας καὶ πεζαῖς στρατιαῖς; οἱ γὰρ Ἕλληνας καὶ Βαρβάρων πρὸς τε ἑαυτοῦς καὶ πρὸς ἀλλήλους τραγωδηθέντες πόλεμοι πάντες ἀπὸ μιᾶς πηγῆς ἐβρόθησαν, ἐπιθυμίας ἢ χρημάτων ἢ δόξης ἢ ἡδονῆς. Pecunia-*

history we may see in Josephus,) arose from causes not laudable; which is the case even now, as we grieve to know. That avarice and



tionibus: οὐδεις γὰρ φύεται ἀνθρώποις πόλεμος ἀνευ κακίας. ἀλλὰ τὸν μὲν φιληδονία, τὸν δὲ πλεονεξία, τὸν δὲ φιλοδοξία τις ἢ φιλαρχία συρρήγγυσι. *Nullum inter homines bellum non ex vitio nascitur: aliud ex voluptatum cupiditate, aliud ex avaritia, aliud ex honorum aut imperii nimio studio conflatur.* Justinus cum Scytharum instituta Lib. II. 2. laudasset; *Atque utinam reliquis mortalibus similis moderatio, et abstinentia aliena foret: profecto non tantum bellorum per omnia sæcula terris omnibus continuaretur, neque plus hominum ferrum et arma quam naturalis fatorem conditio raperet.* Apud Ciceronem est de Finibus primo: *Ex cupiditatibus odia, dissidia, discordiæ, sedi-* cap. 13.

*rum amor, aut femine, aut glorie, aut alicujus demum rei, quæ voluptatem pariat, an parvorum duntaxat et vulgarium malorum causa est? Ob hoc alienantur a cognatis cognati, naturali benevolentia in odium insanabile mutata: regiones autem magnas et fecundæ populorum civilibus vastantur dissidiis: tum vero et terra, et mare implentur calamitatibus nove semper repertis per pedestres navalesque acies. Nam bella illa Græcorum Barbarorumque aut inter se, aut horum in illos, etiam tragœdiis decantata, ab uno fuzere fonte cupiditatis, sive illa divitiarum, sive glorie, sive voluptatum fuit.* Plinius, *Hist. Nat. Lib. II. cap. 63. Placatiore tamen ea (Terra) ob hoc utimur, quod omnes hi opulentia exitus ad scelera, cedes et bella tendunt, quamque sanguine nostro irrigamus, insepultis ossibus tegimus.* Hieronymus *adversus Jovinianum xi. Diogenes tyrannos et subversores urbium, bellaque vel hostilia vel civilia, non pro simplici victu olerum pomorumque, sed pro carnium et epularum deliciis asserit excitari.* Chrysostomus I Cor. xiii. 3, [Tom. II. pag. 77]: *εἰ γὰρ ἅπαντες ἠγάπων καὶ ἠγαπῶντο, οὐδὲν ἐν ἡδίκησεν οὐδεις, ἀλλὰ καὶ φόνοι καὶ μάχαι καὶ πόλεμοι καὶ στάσεις καὶ ἀρπαγαὶ καὶ πλεονεξία καὶ πάντα ἐν ἐκποδῶν ἐγγίνε τὰ πονηρά. Nam si mutuo se*

*diligerent homines, nemo alterum afficeret injuria, procul essent cedes, et pugnae, et bella, et seditiones, et rapinae, et defraudationes, et quicquid est malorum.* Idem *Orat. ad patrem fidelem de opulentis loquens, [Tom. VI. pag. 196]: οὐ δι' ἐκείνου στάσεις καὶ πόλεμοι καὶ μάχαι καὶ πόλεων κατασκαφαὶ καὶ ἀνδραποδισμοὶ καὶ δουλείαι καὶ ἀχμαλωσία καὶ φόνοι καὶ τὰ μυρία ἐν τῷ βίῳ κακά; Nonne per hos adveniunt seditiones, et bella, et pugnae, et urbium excidia, et plagia, et servitutes, et captivitates, et cædes, et innumera vitæ mala?* Claudianus, [*In Rufin. Lib. I vers. 218, et seqq.*]:

*Hæc si nota forent, frueremur simplice cultu, Classica non freremur, non stridula fraxinus iret, Non ventus quaterot puppes, non machina muros.*

*Agathias historiarum primo, (cap. i.): ἐπεὶ δὲ πλεονεξία καὶ ἀδικία αἱ τῶν ἀνθρώπων ψυχὰς αὐθαίρετα καταλιθθαινοῦσαι, πολέμων καὶ ταραχῶν ἅπαντα ἐμφοροῦσιν. Hominum animi sponte ad nimias cupiditates injustitiamque delapsi, implent omnia bellis ac tumultibus. Concludam multa bene dicta uno Polybii: αὐτάρκεια τοῦ βίου φιλοσοφία αὐτοδιδάκτος. Animus necessarii contentus alio ad sapiendum magistro non eget. [Apud SUIDAM, in voce Αὐτάρκεια].*

ambition are the causes of wars, has often been remarked. [See the passages from Tibullus, Strabo, Lucan, Plutarch, Justin, Cicero, Maximus Tyrius, Jamblichus.]

*Dis. xiii. p.*  
142.

*tiones, bella nascuntur.* Maximus Tyrius: *ἄν μεστὰ πάντα πολέμου αἱ γὰρ ἐπιθυμῖαι πλανῶνται πανταχοῦ, περὶ πᾶσαν γῆν τὰς πλεονεξίας ἐπεγεύρουσαι. Nunc omnia bellis plena: ubique enim oberrant cupiditates, et per omnes terras excitant appetitum rerum alienarum.* Jamblichus: *καὶ γὰρ πολέμους καὶ στάσεις καὶ μάχας οὐδὲν ἄλλο παρέχει ἢ τὸ σῶμα καὶ αἱ τούτου ἐπιθυμῖαι. διὰ γὰρ τῆν τῶν χρησίμων κτήσιν πάντες οἱ πόλεμοι γίνονται. Bella, pugnas, seditiones corpus præbet et corporis cupiditates. Nam rerum utibilibium caussa bella omnia oriuntur.*

*Protrept. 13.*

VIII.

17 Quod vero Petro dictum est, *Qui gladio ferit, gladio peribit*, cum non ad bellum communiter spectatum, sed ad bellum privatum proprie pertineat (nam et Christus ipse inhibitiæ aut neglectæ defensionis hanc reddit causam, quod regnum suum de hoc mundo non esset, Joan. xviii. 36) suo loco rectius pertractabitur.

IX. 1 Quoties de scripti sensu quæritur, magnam vim habere solet tum usus sequens, tum prudentum auctoritas: quod etiam in divinis scriptis sequendum est. Neque enim probabile est, Ecclesias, quæ ab Apostolis constitutæ sunt, aut subito, aut omnes defecisse ab iis, quæ Apostoli breviter perscripta ore liberalius explicaverant, aut etiam in usum introduserant. Solent autem ab iis qui bella impugnant adferri

\* *Bonum esse cum puniuntur nocentes nemo negat*] Idem Tertullianus *de Anima: Quis non præferat sæculi justitiam, quam et Apostolus non frustra gladio accinctam contestatur, quæ pro homine sæviendo religiosa est?* (Cap. 33). Et ad Proconsulem Scapulam: *Non te ter-*

*remus, qui nec timemus. Sed velim, ut omnes salvos facere possimus monendo μὴ θεομαχεῖν. Potes et officio jurisdictionis tuæ fungi, et humanitatis meminisse, vel quia et vos sub gladio estis.* (Cap. 4).

\* *Locus est in Lib. De Spectaculis,*

17 (8) What was said to Peter, *He that smiteth with the sword shall perish with the sword*, since it does not properly refer to war in its common aspect, but to private war, (for Christ himself gives this reason for prohibiting or neglecting his defence, that his kingdom was not of this world, Joh. xviii. 36,) will be better discussed in its own place.

IX. 1 When we have to inquire into the sense of any writing, we commonly assign great weight both to subsequent usage, and to the authority of the learned: and this is to be attended to also in the sacred writings. For it is not probable that the Churches, which were constituted by the Apostles, should either suddenly or universally have gone astray from the precepts which being briefly expressed in writing, the Apostles had more fully explained in their oral instructions, or

dicta quædam veterum Christianorum: ad quæ tria dicenda habeo.

2 Primum est, ex iis dictis nihil amplius colligi quam privatam quorundam sententiam, non publicam Ecclesiarum: adde quod ferme quorum ea dicta sunt, amant ab aliis seorsim ire et docere quiddam magnificentius; quales sunt Origenes et Tertullianus, qui nec sibi satis constant. Nam idem Origenes apes ait a Deo documentum datas *πρὸς τὸ δίκαιους καὶ παραγμένους πολέμους, εἶποτε δέοι, γίγνεσθαι ἐν ἀνθρώποις*: *Ut bella justa atque ordinata inter homines gerantur, si quando id jubeat necessitas*: et idem ille Tertullianus, qui alibi supplicia capitalia minus probare videtur, dixit, *Bonum esse cum puniuntur nocentes nemo negat*: Et de militia hæsitat: nam libro de Idololatria, *Queritur, inquit, an fideles ad militiam converti possint, et an militia ad fidem admitti*: Et videtur eo loco propendere in eam sententiam, quæ militiæ adversatur. At libro de Corona Militis, cum quædam adversus militiam disputasset, mox distinguit, qui ante baptismum militabant, ab iis, qui post baptismum nomen dant militiæ. *Plane, inquit, si quos militia præventos fides posterior invenit, alia conditio est, ut illorum, quos Joannes admittebat ad lavacrum; ut centurionum fidelissimorum, quem Christus probat, et quem Petrus catechizat*: *dum*

*Contra Cel.*  
iii. p. 115, et  
vii. p. 348, et  
viii. p. 487.  
*De Coron.*  
Mil. 11 et 12.  
*De Idololat.*  
19.

Cap. 19.

Cap. 11.

cap. xix. et ita legitur (nam Auctor ex memoria illum adferebat: *Bonum est, quæm puniuntur nocentes. Quis hoc, nisi nocens, negabit?* Sic sententia *ἔσπευειν* majorem habet. Cæterum vide quæ de his locis, et aliis, Tertulliani, diximus in Libro Gallico *De Doc-*

*trina Morali Patrum*, Cap. vi. § 6 et seqq. 25, etc. J. B.]

<sup>1</sup> *Dum tamen suscepta fide atque signata*] Distinctionem, quam hic de militia affert, alibi ad nuptias applicat, tum libro de *Monogamia*, tum exhortatione castitatis.

from the usages which they had established. Now those who argue against war are accustomed to adduce some sayings of the ancient Christians; on which I have three remarks to make.

2 (1) The first is that from these passages, nothing more can be collected than the private opinion of certain individuals, not the public judgment of the Church: add to which, that the persons whose sayings are quoted are mostly writers who like to go in a path of their own, and to teach in a very high strain; such are Origen and Tertullian. But even these writers are not consistent with themselves. For the same Origen says that bees are an example appointed by God to show that just wars may be carried on if it be necessary: the same Tertullian who in other places seems to disapprove of capital punishment,

*tamen suscepta fide atque signata, aut deserendum statim sit, ut multis actum, aut omnibus modis cavillandum, (id est cavendum) ne quid adversus Deum committatur.* Sensit ergo illos post baptismum in militia permansisse; quod sane minime facturi fuerant, si intellexissent militiam a Christo interdictam; non magis, quam aruspices, magi, <sup>¶</sup>et alii veterarum artium professores in sua arte post baptismum manere permisi sunt. Eodem libro militem quendam, et quidem Christianum, laudans, *O militem, inquit, in Deo gloriosum.*

Cap. 1.

II.

3 Secunda observatio est, quod militiam Christiani sæpe aut improbarunt, aut evitarunt ob temporum circumstantias, quæ vix ferebant militiam exerceri sine actibus quibusdam cum Christiana lege pugnantibus. In literis Dolabellæ ad Ephesios, quæ apud Josephum exstant, videmus Judæos ab expeditionibus militaribus immunitatem postulasse, quod externis permixti non satis ritus legis suæ observare possent, et quia sabbatis ferre arma et magna itinera facere cogerentur. Atque easdem ob causas a L. Lentulo missionem Judæos impetrasse docet idem Josephus: alibi quæ narrat, cum Judæi Roma urbe jussi essent excedere, quosdam militiæ adscriptos, alios punitos quod militare nollent patriarum legum

Antiq. Jud.  
xiv. 10. § 12.Ibid. § 13.  
Lib. xviii. 3.  
§ 5.

<sup>¶</sup> *Et alii veterarum artium profes-  
sores] Tertullianus de Idololatria :*  
(cap. 5): *ad Ecclesiam non admittuntur  
qui artes exercent, quas Dei disciplina  
non recepit.* Augustinus *de Fide et  
Operibus: Meretrices et histriones, est*

*quilibet alii publicæ turpitudinis profes-  
sores, nisi solutis aut diruptis talibus  
vinculis, ad Christi sacramenta non per-  
mittuntur accedere.* [Cap. 18, num. 33,  
Tom. vi.] De histrione exemplum vide  
apud Cyprianum epistola lxxv. de lanis-

says also, *Nobody but a criminal will deny that it is a good thing when criminals are punished.* And as to a military life, he hesitates. In the treatise *De Idololatria*, he seems to incline against it; but in the treatise *De Corona Militis* he distinguishes in favour of the condition of those who were soldiers before they were Christians. He knew that such had continued soldiers, which they would not have done if they had understood that a military life was forbidden by Christ; any more than soothsayers, magicians, and other professors of forbidden arts were permitted to practise their art after baptism. In the same book he addresses a certain Christian soldier, *O glorious soldier in God.*

3 (2) The second observation is that the Christians often avoided or disparaged a military life on account of the circumstances of the time, which scarcely permitted a soldier's life to go on without some acts inconsistent with the Christian law. We see in Josephus that the Jews asked and in some cases received excuse from military duties

reverentia; ob eas scilicet quas diximus causas: quibus accedebat interdum tertia, quod adversus populares suos pugnandum haberent; at κατὰ τῶν ὁμοφύλων ὄπλα λαβεῖν ἀθέμιτον, nefas in populares suos arma sumere; tunc scilicet cum populares ob patriæ legis observationem periclitabantur. Quoties vero hæc incommoda cavere poterant Judæi, militabant etiam sub externis regibus, sed ἐμμένοντες τοῖς πατρίοις ἔθεσι καὶ κατὰ ταῦτα ζῶντες, <sup>Joseph. in Vit. sua, § 6.</sup> *perstantes in patriis institutis et ex eorum præscripto viventes*: quod pacisci prius solebant, eodem Josepho auctore. His periculis simillima sunt quæ Tertullianus militiæ suorum temporum objicit, ut libro *de Idololatria*: *Non convenit sacramento Cap. 19. divino et humano, signo Christi et signo diaboli*: quia scilicet per Deos Gentium, Jovem, Martem, atque alios, jurare milites jubebantur. Libro autem *de Corona Militis*: *Cap. 11. Excubabit pro templis quibus renuntiavit, et cenabit illic ubi Apostolo non placet: et quos interdum exorcismis fugavit, noctibus defensabit?* mox: *Quanta alia in delictis circumspici possunt castrensiun munium, transgressioni interpretanda?*

4 Tertium quod notamus hoc est, Christianos primorum III.

tis, lenonibus, victimarum redemptoribus, apud Tertullianum: (*De Idololatr. c. 11*), de auriga Circensi, apud Augustinum. [Immo in Epistola Episcoporum, de rebus in Arelatensi Concilio gestis, Appendic. Tom. ix. col. 16.

Adde *Constitution. Apostolic. Lib. viii. cap. 32*].

\* *Perstantes in patriis institutis*] Verba Josephi xi. *Historiæ Antiquæ.* (Cap. viii. § 5).

on the ground of their interfering with their national usages. [See the passages in the text.] Very similar are the difficulties which Tertullian objects to the military profession of his time; as in the book *De Idololatria*, *There is no consistency between the military oath (sacramentum) and the divine sacrament*: namely, because the soldiers had to swear by the heathen gods, Jupiter, Mars and others; but in the book *De Corona Militis*, he says, *Shall he keep guard in front of the temples which he has renounced, and sit in places such as the Apostle condemns, and be the defender by night of those powers which his exorcisms have driven away in the day?* And again, *How many other things are there in the duties of a soldier which the Christian must interpret as transgressions!*

4 (3) The third remark which I make is this, That the Christians of the first times were animated by so ardent a desire to do what was best, that they often accepted the divine counsels as if they

temporum tanto ardore succensos fuisse ad præclarissima quæque capessenda, ut sæpe consilia divina pro præceptis amplecterentur. <sup>6</sup> Christiani, inquit Athenagoras, *οὐ δικάζονται τοῖς ἀρπάζουσι, adversus sua rapientes judicio non contendunt.*

*Apolog. 17.* Salviaus jussum a Christo ait, ut ea ipsa de quibus lis est relinquamus, dummodo litibus exuamur. Atqui vid ita generaliter sumtum consilii forte est et vitæ sublimioris, at non in præcepto positum. Simile est quod plurimi veterum omne juramentum improbant, nulla exceptione addita, cum tamen Paulus in re gravi juraverit. Christianus apud Tatianum, *στρατηγίαν παρήτημαι, præturam recuso*: apud Tertullianum, *Christianus nec œdilitatem affectat.* Sic Lactantius justum (qualem vult esse Christianum) negat belligeratum; sed ita ut simul navigaturum neget. A secundis nuptiis quam multi veterum Christianos dehortantur? Quæ omnia sicut laudabilia, eximia, Deo apprime grata sunt, ita nullius legis necessitate a nobis exiguntur. Atque hæc solvendis quæ obijciuntur sufficient.

X. 1 Nunc ut nostra firmemus, primum non desunt nobis scriptores, et quidem antiquiores, qui et capitalia supplicia,

<sup>6</sup> Quæ ad *Consilia Evangelica* ab Auctore nostro, aut aliis referuntur, vel per se nec bona sunt, nec mala, vel habent necessitatem quamdam *præcepti*, respectu hujus vel illius hominis, in certis casibus et circumstantiis. Qua de re

fuse egimus in nostris ad hunc locum Gallicis notis: ubi simul, unde ortus sit error eorum, qui hanc distinctionem inter *Præcepta* et *Consilia Evangelica* excogitarunt, ostendimus, studiumque ejusmodi *Consiliis* utendi facile homines

had been commands. Thus Athenagoras says that the Christians do not resist by the law those who plunder them; Salviau says that we are commanded to give up that which is the subject of a suit, that we may be rid of litigation. And, speaking generally, such is perhaps the tendency of Christian counsel, and the scheme of the highest Christian life; still it is no command. In like manner, many of the early fathers disapprove of oaths altogether, without making any exception; though Paul himself on an important occasion used an oath. In this way Lactantius says that a righteous man (by which he means a Christian) will not be a soldier; but he also asserts that he will not be a sailor. How many of the ancient Christian writers exhort their followers against second marriages! And all these things are laudable, excellent, very agreeable to God, but are not required of us by any law of necessity. And these remarks will suffice for solving the objections to the lawfulness of war taken from the early Christian writers.

X. 1 But now to confirm our case, in the first place there are

et quæ inde pendent bella, sentiant a Christianis licite posse usurpari. Nam Clemens Alexandrinus Christianum ait, si ad imperium vocetur, ut Moses, futurum vivam subditis legem, et præmio affecturum bonos, pœnis malos. Et alibi habitum Christiani describens, decere eum ait intactis esse pedibus, nisi forte militet. <sup>1</sup>In Constitutionibus, quæ Clementis Romani nomen præferunt, Libro VII. cap. 3. legimus: *οὐχ ὡς παντὸς φόνου φαύλου τυγχάνοντος, ἀλλὰ μόνου τοῦ ἀθώου, τοῦ δ' ἐνδίκου ἄρχουσι μόνους ἀφωρισμένον* non quasi omnis cædes illicita sit, sed ea, quæ est innocentis: ita tamen, ut quæ justa est, magistratibus solis sit reservata.

2 Sed, auctoritatibus privatis sepositis, ad publicam Ecclesiæ veniamus, quæ maximi debet esse ponderis. Dico igitur, nunquam a baptismo rejectos, aut ab Ecclesia excommunicatos eos, qui militabant, quod tamen et factum oportuit et factum fuisset, si militia cum novi fœderis conditionibus pugnasset. In dictis modo Constitutionibus, Lib. VIII. cap. 32, agit scriptor ille de iis, qui antiquitus ad baptismum admitti, aut ab eo rejici solerent: *στρατιώτης προσίων διδασκέσθω μὴ ἀδικεῖν, μὴ συκοφαντεῖν· ἀρκεῖσθαι δὲ τοῖς διδομένοις ὀψωνίοις· πει-*

a veræ Virtutis via avertere, tantum abest ut ad illam sit incitamentum. J. B.

<sup>1</sup> *Id ita generaliter sumtum consilii forte est et vitæ sublimioris*] Concilium Carthaginense IV: *Episcopus nec provo-*

*catus de rebus transitorii litiget.* Adde Ambrosium Lib. II. *Offic.* cap. XXI. et Gregorium Magnum libro II. Ind. XI. *Epist.* LVIII.

<sup>2</sup> *In Constitutionibus*] Videtur scriptus is liber finiente sæculo secundo.

not wanting writers on our side, more ancient than those just quoted, who assume that both capital punishments and wars may be lawfully used by Christians. Clemens Alexandrinus says that the Christian, if he is called to empire, will be like Moses, a living law to his subjects, will reward the good and punish the bad. And in another place, describing the dress of the Christian, he says he will go barefoot, except he happen to be a soldier. And in the Constitutions which bear the name of Clemens Romanus, it is said that, *Not all putting to death is unlawful, but only that of an innocent man: but that which is right in this case, it is for the magistrates alone to judge.*

2 But setting aside private authorities, let us come to the public authority of the Church, which ought to be of the greatest weight. I say then that soldiers were never rejected from baptism, or excommunicated, on that account; which should have been done and would have been done, if a military life had been at variance with the Christian covenant. In the Constitutions already quoted we read, *A soldier*

Cap. 42. *θήμενος προσδέχέσθω: miles baptismum postulans doceatur ab injuriis et vexationibus abstinere: contentus esse suis stipendiis. Si his pareat, admittitor.* Tertullianus in *Apologético* ex persona loquens Christianorum; *navigamus, inquit, et nos vobiscum, et militamus.* Paulo ante dixerat: *externi sumus et vestra omnia implevimus, urbes, insulas, castella, municipia, conciliabula, castra ipsa.* Eodem libro narraverat <sup>a</sup>M. Aurelio Imperatori Christianorum militum precationibus imbrem impetratum. In *Corona* militem illum qui coronam abjecerat, constantiorem ait fuisse cæteris fratribus, et multos ei ostendit fuisse Christianos commilitones.

Cap. 37.

Cap. 5.

Cap. 1.

3 Accedat, quod et milites nonnulli, pro Christo tormenta mortemque perpessi, eundem cum cæteris martyribus honorem ab ecclesia acceperunt, quos inter memorantur <sup>b</sup>tres Pauli comites; sub Decio Cerialis, sub Valeriano Marinus, quinquaginta sub Aureliano, Victor, Maurus, et Valentinus magister militum sub Maximiano, circa idem tempus Marcellus Centurio, Severianus sub Licinio. Cyprianus de Laurentino et Ignatio

Epist. 32.

<sup>a</sup> *M. Aurelio Imperatori*] Vide et Xiphilinum de hac historia.

<sup>b</sup> *Tres Pauli comites*] Adde militem quendam a Cornelio baptizatum, cujus apud Adonem mentio.

<sup>7</sup> In omnibus Editionibus heic erat *suppliciiis*: sed vel Auctorem, vel Ty-

pographos, vocem illam ex incogitantia posuisse, pro *judiciiis*, ex sequentibus manifestissimum est; quum heic non agatur de spectando supplicio reorum, sed de *judicando* in causa capitis. Et ita apud Tertullianum *de Idololatr.* cap. 19. *An Militia ad fidem admitti...cui*

*seeking baptism is to be taught to abstain from violence and extortion, and to be content with his wages. If he conform to this, let him be admitted.* Tertullian, in his *Apology*, speaking in the character of the Christians, says, *We act with you as sailors, as soldiers.* A little before he had said: *We are strangers to you, and yet we have filled all the departments of your society; your cities, islands, castles, towns, councils, even your camps.* In the same book he had narrated that a shower was sent in answer to the prayers of Christian soldiers in the army of M. Aurelius. In the *de Corona*, he says that the soldier who had cast off the crown was a more stedfast man than his brethren, and he shews that he had many Christian fellow-soldiers.

3 Add to this, that some soldiers, who suffered torments and death for Christ, received from the Church the same honour as the other martyrs: among these are recorded three companions of St Paul; Cerialis under Decius; Marinus under Valerian; fifty persons under Aurelian; Victor, Maurus, and Valentinus, soldier-master under Maximian; about the same time Marcellus the Centurion, and Severianus under Licinius. Cyprian writing concerning Laurentinus and



*Afris: In castris et ipsi quondam sæcularibus militantes, sed veri et spirituales Dei milites, dum diabolum Christi confessione prosternunt, palmas Domini et coronas illustres passione meruerunt. Et hinc apparet quid de militia senserit communitas Christianorum, etiam priusquam imperatores Christiani essent.*

4 Capitalibus judiciis <sup>7</sup>si non libenter interfuerunt Christiani illis temporibus, haud mirum videri id debet, cum plerumque de Christianis ipsis esset judicandum: adde quod et in cæteris rebus leges Romanæ duriores erant, quam lenitas Christiana patiatur: quod vel solo <sup>c</sup>Siliani Senatusconsulti exemplo satis patet. Postquam vero Constantinus Christianam religionem et probare, et promovere cœpit, non ideo desierunt capitalia supplicia. Imo ipse Constantinus inter alias leges de parricidis culeo insuondis legem tulit, quæ extat Codice Titulo de iis qui parentes vel liberos occiderunt; quanquam alioqui in suppliciis exigendis mitissimus fuerit, ita ut ab historicis non paucis reprehendatur <sup>d</sup>nimiæ lenitatis nomine.

*Leg. ultc.*

*non sit necessitas immolationum, vel CAPITALIUM judiciorum. J. B.*

<sup>c</sup> *Siliani Senatusconsulti*] Cujus asperitatem mitigavit Adrianus Imperator, ut apud Spartianum est. Asperis Romanorum legibus addi possunt, quæ servum nisi tortum testimonium dicere

vetant. [Vid. COD. *De Serv. fugitivis* etc. L. 4. et Clar. ΝΟΟΡΤΗ *Prob. Juris*, Lib. 1. cap. ult. in fine. *J. B.*]

<sup>d</sup> *Nimiæ lenitatis nomine*] Zonaras, [Lib. XIII. cap. iv. pag. 11, T. II. ed. *Reg.*] τοῖς μεταβαλλομένοις ἐκ πονηρίας φιλόανθρωπον διατιθέμενος, ἔλεγεν

Ignatius, two African Christians, says, *They formerly served in the armies of men, but being true and spiritual soldiers of God, they overthrew the devil by the confession of Christ, and by their suffering obtained as their reward, the palms and immortal crowns given by their divine Master.* And hence it appears what the Christian community thought of a soldier's profession, even before the emperors were Christians.

4 That the Christians at that time did not like to be present at capital punishments, ought not to seem strange, since Christians were often the subjects of such punishments. Add to this that the Roman laws were too harsh to agree with Christian kindness, as the Silanian Law may serve to shew\*. But after Constantine had begun to favour and encourage the Christian religion, capital punishments were still not discontinued. Constantine himself established a capital punishment of a peculiar kind for parricides and child-murderers; though in other respects very merciful, so that he was blamed by many for his excessive lenity. Also he had in his army many Christians, as history teaches

\* [The Law that when a man was killed in his own house, all his slaves should be put to death. See Tacit. *Ann.* XIV. 42.]

Tum vero in exercitu suo plurimos habuit Christianos, ut nos historiæ docent, et labaro Christi nomen inscripsit. Ex eo etiam mutatum est sacramentum militare in eam formam, quæ exstat apud Vegetium: *per Deum et Christum et Spiritum Sanctum, et per majestatem Imperatoris, quæ secundum Deum generi humano diligenda est et colenda.*

5 Neque eo tempore ex tot Episcopis, inter quos multi erant durissima quæque passi pro religione, vel unus fuisse legitur, qui aut Constantinum ab omnibus omnino capitalibus suppliciis et bello, aut Christianos a militia injecto divinæ iræ metu absterruerit, cum tamen plurimi essent acerrimi custodes disciplinæ, et minime dissimulantes eorum, quæ ad officium tum Imperatorum, tum aliorum pertinerent: qualis et Theodosii tempore fuit Ambrosius, qui Sermone VII. ita ait: *Non militare delictum est, sed propter prædam militare peccatum est: et de Officiis: Fortitudo, quæ vel bello tuetur a barbaris patriam, vel domi defendit infirmos, vel a latronibus socios,*

De Re  
Milit. II. 5.

Tribuitur  
male Augusti-  
no, infr. II.  
25. § 9. n. 3.  
Lib. I. 27.

ὅτι τὸ νοσοῦν μέλος ἀποκοπτεῖον καὶ σσηπὸς, ἵνα μὴ καὶ τοῖς ὑγιαίνουσι λυμανεῖται, οὐ μὲν τοι τὸ ὑγιείας ἤδη τυχόν ἢ καὶ ὑγιαζόμενον. Clementem se ostendebat iis, qui pravam vitam deseruerant, quod diceret abscindendum membrum egrotans ac putridum, ne sana contagio corrumpat, non id quod aut sanatum jam sit aut sanescat. Vide et Eusebium, [de Vita Constantini, Lib. IV. cap. 31]. Sicut de nimia Constantini lenitate Christianos, ita de Heraldi Re-

gis questos Danos apud Saxonem historicum invenias. [Lib. XI. p. 194].

\* *Sepe Episcopus*] Augustinus: [ep. 153. vulg. 64]. *Officium Sacerdotis est intervenire pro reis.* In ejus epistolis multa sunt hujus bonitatis specimina. [Confer heic quæ habet RADULPH. FORNEBIUS, *Rer. Quotid.* Lib. VI. cap. 7].

<sup>†</sup> *Ut qui ad Ecclesiam confugissent*] Vide Chrysostomum XVI. *de Statuis.* [Nili ibi ad rem. Voluit forte dicere *Orat.*

us, and inscribed his banner with the name of Christ. From that time also the military oath was changed into the form, which is extant in Vegetius, *By God, and Christ, and the Holy Ghost, and by the majesty of the Emperor, which next to God is to be revered and beloved by mankind.*

5 Moreover, out of so many bishops who had braved the extremest sufferings for religion, there was not at that time a single one, who tried to scare Constantine from capital punishments and war, or Christians from military service, by the prospect of the divine anger: though many of them were most strenuous guardians of religious discipline, and not at all given to pass over what concerned the duty, either of the Emperor, or of others: such as was Ambrose in the time of Theodosius, who in his seventh Sermon says: *It is not soldiering which is a sin, but soldiering for plunder:* and in his *Duties: The courage which defends our country from barbarians abroad, or the help-*

*plena justitia est.* Hoc argumentum tanti mihi videtur, ut nihil ultra requiram.

6 Neque tamen ignoro, sæpe episcopos, et plebem Christianam, interpositis precibus suis avertisse pœnas, præsertim capitales: morem quoque introductum, <sup>1</sup>ut qui ad ecclesiam confugissent, non nisi vitæ servandæ fide data redderentur; et <sup>2</sup>ut circa pascha carcere emitterentur, quos sua crimina attinebant; sed, qui cum cura hæc omnia et si qua his sunt similia expendit, inveniet, signa hæc esse Christianæ bonitatis omnem rapiëntis clementiæ occasionem, non omnia judicia capitalia damnantis animi: unde et locorum et temporum illa beneficia, et preces ipsæ <sup>3</sup>exceptionibus quibusdam temperabantur.

7 Objiciunt hic nobis nonnulli XII. canonem Synodi Nicæensis, qui Latine sic habet: <sup>1</sup>*Quicumque vocati per gratiam, primum quidem ardorem fidemve suam ostenderunt, et cingulum militiæ deposuerunt, postea vero ut canes ad suum*

L

XVII. ubi aliquid de Monachis, pag. 575, in fin. Tom. VI. *J. B.* Concilium Aurelianense cap. 3. legem Wisigothorum. Libro VI. tit. v. 16; IX. tit. III. c. 3.

<sup>2</sup> *Ut circa Pascha*] L. Nemo. 3. C. de *Episc. audientia.*

<sup>3</sup> *Exceptionibus quibusdam*] Quas vide apud Cassiodorum, XI. 40. et cap. inter alia, 6. de Immunitate ecclesiastica, in Decretalibus.

<sup>1</sup> *Quicumque vocati*] Simeon Magister in ejus canonis epitome: οἱ βιαζόμενοι

καὶ δόξαντες ἀντιστῆναι, εἰτα καταβήμενοι τῆς ἀσέβειας καὶ ἀναστρατευσόμενοι, δεκαετὶν ἀφορίζεσθῶσαν. *Qui ut adhibita vi sunt restitisse, sed ab impietate victi sunt et militiam resumere, decem per annos abstineantur.* Eundem hujus canonis sensum exprimunt Balsamo et Zonaras, et Rufinus libro X. cap. VI. [Adde BINGHAM, *Origines Eccles.* Lib. XI. cap. v. § 10. Tom. IV. pag. 248, et seqq.]

*less from harm at home, or society from robbers, is mere justice.* This argument seems to me so strong that I require nothing more.

6 Not that I am ignorant that bishops and Christian men often interposed with their instructions to avert punishment, especially capital punishment; nor that a practice was introduced that those who had taken refuge in the Church, should not be given up except on the assurance that their lives would be spared; and also that at the time of Easter, criminals who were in prison were set free. But any one who examines these circumstances with care will see that they are the marks of Christian kindness, seizing every occasion of clemency; not manifestations of an opinion condemning all capital punishments; and accordingly the places and times and interposition which procured such indulgence were limited by certain exceptions.

7 (1) Here some object to us the twelfth Canon of the Council of Nicæa, which directs that, *If persons called by grace, have first*

vomitum reversi sunt; ita ut aliqui et pecuniam darent, et beneficiis militiam repeterent, hi decem annis jaceant, post triennii auditionis tempus. In his autem omnibus observari oportet propositum et modum pœnitentiæ. Quicumque enim, et timore, et lacrymis, et patientia, et bonis operibus conversionem absque simulatione demonstrant, hi definitum tempus auditionis implentes, tum demum orationibus communicabunt, et postea licebit episcopo de his aliquid humanius cogitare. Quicumque vero indifferenter tulerunt, et habitum ecclesiam introeundi sibi arbitrati sunt ad conversionem sufficere, hi definitum tempus omnino impleant. Vel ipsum tredecim annorum tempus satis indicat, non de levi aut ambiguo, sed gravi aliquo atque indubitato crimine hic agi.

8 Agitur autem haud dubie <sup>k</sup> de idololatria: nam quæ canone xi. præcesserat mentio temporum Licinii, in hoc canone repetita tacite haberi debet: ut sæpe Canonum sequentium sensus a prioribus pendet. Vide in exemplum Canonem xi. Concilii Eliberini. Licinius autem, verba sunt Eusebii, στρατιώτας ἐκέλευεν ἀποβάλλεσθαι τοῦ ἄξιώματος, εἰ μὴ τοῖς δαίμοσι θύειν αἰροῖντο, *milites militia exuebat, nisi Diis sa-*

De Vita  
Constantin.  
l. 64.

<sup>k</sup> De idololatria] Quod principale crimen, summi sæculi reatus dicitur Tertulliano de Idololatria, (Cap. 1.): *gravissimum et extremum delictum Cyprian. Epist. xv.*

<sup>l</sup> Nisi Diis sacrificare vellent] Sulpitius Severus (*Hist. Sacr. Lib. II. cap. 33*): *Sane tum Licinius, quia adversum Constantinum de imperio certavit, milites suos litare præceperat: abnuentes*

*renounced the military profession (cingulum militiæ deposuerunt,) and then returned to it, as dogs to their vomit; let them, after being Hearers for three years, be Penitents for ten years\* ; with power in the bishop to modify their sentence according to the evidence of their repentance.*

Here the mention of a penitence of thirteen years indicates at once that there is question not of some slight and ambiguous, but of some grave and undoubted crime.

8 And in fact there is no doubt that *Idololatria* is the crime in question; for what had been said before in the eleventh Canon, must be understood as tacitly repeated here: as is customary in Canons. Now Licinius, as we learn from Eusebius, made men quit the military profession except they would sacrifice to the heathen gods, which Julian afterwards imitated; on which account Victricius and others are said to have given up the military profession (*cingulum abjecisse*) for Christ. The same thing had before been done in Armenia under Diocletian by one thousand one hundred and four persons, of whom there is

[\* There were four degrees of Penitence in the early Church, Πρόσκληυσις, Ἀκρόασις, Ὑπόπτωσις, Σύστασις. *Gronovius.*]

*crificare vellent*; quod et Julianus postea imitatus est, quam ob causam Victricius atque alii cingulum pro Christo abjecisse leguntur. Idem olim sub Diocletiano fecerant in Armenia mille centum quatuor, quorum in martyrologiis mentio: et in Ægypto Menna, et Hesychius. Sic ergo et Licinii temporibus multi abjecere cingulum, quorum fuit Arsacius inter Confessores nominatus, et Auxentius factus postea Mopsuestiæ Episcopus. Quare his, qui semel conscientia puncti cingulum abjecerant, reditus ad militiam sub Licinio non patebat nisi per fidei Christianæ abnegationem: quæ quia eo erat gravior, quo prior ille actus majorem in illis legis divinæ cognitionem testabatur, ideo hi defectores gravius etiam puniuntur quam illi, de quibus egerat præcedens canon, qui sine periculo vitæ aut facultatum amittendarum Christianismum abjecerant. Generaliter autem de omni militia interpretari canonem, quem produximus, ab omni ratione alienum est. Aperte enim testatur historia, his, qui sub Licinio militiam abjecerant, neque Licinio imperante ad eam redierant, ne fidem Christianam violarent, a Constantino datam optionem, immunesne esse a militia vellent, an ad militiam redire: quod haud dubie multi fecerunt.

Sosomen. H.  
Ecl. v. 17.

Euseb. VII.  
Constant. II.  
33.

*militia rejiciebat.* Ob hanc causam Valentinianus, qui imperator postea factus est, sub Juliano abjecit cingulum. Non dissimile est quod Victor

*Uticensis* narrat, multos sub Hunericho Rege militiam temporalem abjecisse, quia cum Arianismo erat connexa.

mention in the Martyrologies; and by Menna and Hesychius in Egypt. And thus at the time of Licinius many renounced the military profession; among whom was Arsacius, who is named among the Confessors, and Auxentius, who was afterwards bishop of Mopsuesta. And thus those who, pricked by conscience, had once left the military profession, could not return to it under Licinius, except by renouncing the faith of Christ; and this transgression was the more grievous, inasmuch as their former act shewed that they had knowledge of the divine law; wherefore those defaulters are punished even more severely than they who are mentioned in the preceding Canon, who, without danger to their life or fortune, had renounced Christianity. But to interpret the Canon which we have quoted as referring to a military life in general, is contrary to common reason. For history clearly testifies that those who under Licinius had renounced military life and had not returned to it under Licinius, in order that they might not violate the Christian faith, had the option given them by Constantine, whether they would be excused military service or enter the army; and no doubt many of them did the latter.

II.  
Epiſt. xc. ad  
Rustic.  
Epiſc.

9 Sunt et qui Leonis epistolam objiciant, quæ dicit, *Contrarium esse Ecclesiasticis regulis, post penitentiae actionem redire ad militiam sæcularem.* Sed sciendum, in penitentibus non minus quam in clericis et ascetis exactam fuisse vitam non quovis modo Christianam, sed eximie cujusdam puritatis, <sup>m</sup> ut tanto exemplo essent ad correctionem, quanto ad peccandum fuerant. Similiter in consuetudinibus antiquissimis Ecclesiæ, quæ, quo augustiori nomine commendabiliores essent, Canones Apostolici vulgo appellabantur: Canone LXXXII. edicitur: *Ne quis episcopus, presbyter, aut diaconus, militiæ vacet, et utrumque retineat, officium Romanum et functionem sacerdotalem. Quæ enim Cæsaris sunt Cæsari, quæ Dei Deo.* Quo ipso ostenditur, his qui cleri honorem non sperant Christianis militiam non fuisse interdictam.

10 Hoc amplius, etiam <sup>n</sup> ad clerum admitti vetabantur, qui post baptismum aut magistratus attigissent, aut munera bellica, ut in epistolis Syrii et Innocentii, et in Concilio To-

<sup>m</sup> *Ut tanto exemplo essent ad correctionem, quanto ad peccandum fuerant]* Leo epistola xc. ad Rusticum: *Illicitorum veniam postulantem oportet etiam multis licitis abstinere.* In epistola episcoporum ad Ludovicum Regem legimus: *Quilibet tanto a se licita debet abstinere, quanto se meminit et illicita perpetrasse.* In Capitulis Calvi: *Tanto quisque majora querat bonorum operum lucra, quanto graviora sibi intulit damna*

*per culpam.*

<sup>n</sup> *Ad clerum admitti vetabantur]* Eusebius *Demonstrationum*, Lib. i. duplicem describit Christianorum vitam, aliam *ὑπερῆν*, aliam inferiorem: qui in hac sunt, eos inter alia τοῖς κατὰ τὸ δίκαιον στρατευομένοις τὰ πρακτέα ὑποτίθεσθαι, iis qui *juste militant agenda* indicare. (Cap. 8).

<sup>o</sup> *Nulla alia cura ac labore]* Vide Canonem Concilii Moguntini apud Gra-

9 (2) Some object to us the epistle of Leo, which says, *It is contrary to ecclesiastical Rule, to return to a military life after act of penitence.* But we are to recollect that penitents, no less than clerical persons and ascetics, were required to lead a life not only Christian, but of eminent purity, that as great an example might be given for correction as had been given for sin. In like manner in the record of the ancient usages of the Church, which, to give it authority, is commonly called the Apostolic Canons, it is directed: *No Bishop, Priest, or Deacon, shall be a soldier, or shall have the characters of a Roman officer, along with his sacred function. The things which are Cæsar's are for Cæsar; those which are God's are for God.* Which passage shews that those who did not seek the honour of the clerical profession were not forbidden to be soldiers.

10 More than this; those were forbidden to be admitted to the clerical order who after baptism had either held a magistrate's office, or a command in war; as we may see in the epistles of Syrius and

letano videre est. Legebantur scilicet clerici non ex quovis modo Christianis, sed ex iis, qui vitæ exactissimæ specimen dedissent. Adde quod militiæ et quorundam magistratum perpetua non erat obligatio; at sacro ministerio addicti °nulla alia cura ac labore quotidiano inde abstrahi debebant: qua de causa et sextus canon constituit, ne Episcopus, presbyter, aut diaconus sæculares curas administret, octuagesimus ne publicis se administrationibus immittat: et inter Africanos Canones sextus, °ne procurationem rerum alienarum suscipiat, aut causarum patrocinium; sic eosdem ¶tutores constitui nefas judicat Cyprianus.

11 At pro nostra sententia expressum Ecclesiæ judicium habemus in Concilio primo Arelatensi, quod habitum est sub Constantino. Ejus enim Concilii Canon III. sic habet: *De his, qui arma projiciunt in pace, placuit abstinere eos a communionem*: id est, qui militiam deserunt extra tempora persecutionis.

¶ Id enim pacis nomine intelligi volebant Christiani, ut ex Cy-

tianum, titulo, Ne Clerici vel Monachi. [Immo in *Decretaliis*, Lib. III. tit. L. cap. 1].

¶ Ne procurationem rerum alienarum suscipiat] Vide *Epistolam Hieronymi ad Nepotianum*.

¶ Tutores constitui nefas judicat Cyprianus] In epistola ad presbyteros, diaconos et plebem Furnis consistentem. [Epist. I.] Adde I. Generaliter, 52. c. de *Episcopis et Clericis*.

¶ Id enim pacis nomine intelligi volebant] Tertullianus de *Idololatria*: (cap. 19). Imo quomodo etiam in pace militabit? idem de *Fuga persecutionum*: *Nostræ paci quod est bellum quam persecutio?* (cap. 3): Cyprianus epistola XVI. *Quando ipsa ante mater nostra Ecclesia pacem de misericordia Domini prior sumserit*: Epistola XXI: *Cum Dominus cepit ipsi Ecclesiæ pacem dare*: Epistola XXX: *Ecclesiæ pacem sustinen-*

Innocentius and in the Council of Toledo. In fact, clerical persons were taken not from Christians of every kind, but from those who had given an example of a most correct life. Add to this, that the obligations of military service and of some magistracies was not perpetual; but those who were devoted to the sacred ministry, were not allowed to be drawn from it by any other daily care and labour. On which account the sixth Canon also directs that No Bishop, Priest, or Deacon should administer secular cases, and the eightieth, that he shall not even involve himself in public administration; and the sixth of the African Canons, directs that he shall not undertake a trust or advocacy in the affairs of others; as Cyprian thinks that they should not even undertake the office of guardian.

11 We have the express judgment of the Church on our side in the council of Arles, held under Constantine: for the third Canon of the Council says thus: *Those who cast away their arms in peace shall abstain from the communion*: that is, those who leave the army in a

priano et aliis apparet. Accedat exemplum militum sub Juliano, non modico profectu Christianorum, ut qui morte sua Christo reddere testimonium parati essent: de quibus sic Ambrosius: <sup>8</sup> *Julianus imperator, quamvis esset apostata, habuit tamen sub se Christianos milites: quibus cum dicebat; Producite aciem pro defensione reipublicæ, obediebant ei: cum autem diceret eis: Producite arma in Christianos, tunc agnoscebant imperatorem cæli.* Talis et multo ante fuerat Thebæa legio, quæ Diocletiano imperante a Zabda tricesimo Hierosolymorum Episcopo Christianam religionem acceperat, et deinde in omne ævum memorabile edidit Christianæ constantiæ et patientiæ exemplum, quod <sup>9</sup>infra a nobis memorabitur.

12 Hoc loco satis sit illam eorum adferre vocem, quæ Christiani militis officium solida brevitate exprimit: *Offerimus nostras in quemlibet hostem manus, quas sanguine innocentium cruentare nefas ducimus. Dexteræ ipsæ pugnare adversus impios et inimicos sciunt, laniare pios et cives nesciunt. Meminimus nos pro civibus potius quam adversus*

*dam, id est expectandam: de Lapsis, disciplinam paz longa corruperat.* (pag. 123.) Sulpitius Severus: (Lib. 11. cap. 32). *Antonino Pio imperante paz Ecclesiis fuit: mox: Interjectis deinde annis xxviii. paz Christianis fuit: et in Constantini ætate: (ibid. cap. 33). Exinde tranquillis rebus pace perfruimur. Et initio historiæ: Vexationesque populi Christiani, et mox pacis tempora.*

(Lib. 1. cap. 1.)

<sup>8</sup> Ambrosio equidem verba hæc tribuuntur a Gratiano, Caus. xi. Quæst. iii. Can. 94. sed non indicato loco. Similis est locus Augustini, ibi etiam relatus, Can. 98. ex Comm. in Psalmum 124. Unde priorem forte natum esse, in Rubrica conjiciunt. *J. B.*

<sup>9</sup> Cap. iv. hujus Libri, § 7, num. 10, et seqq. ubi vide quæ monebimus. *J. B.*

time when there is no persecution raging; for that is what the Christians meant by peace, as appears in Cyprian and others. Add to this the example of the soldiers under the Emperor Julian, Christians of no common proficiency, who were ready to render testimony to Christ by their deaths: they were willing to fight in defence of the State, but when commanded to use their weapons against Christians, they acknowledged the Emperor of Heaven. Of like character had before been the Theban Legion under Diocletian, of which we shall speak hereafter.

12 At present it may suffice to quote the expressions of those who describe the office of the Christian soldier with compact brevity: *We offer to you our arms as ready to use them against any enemy, though we refuse to stain them with the blood of the innocent. Our right hands know the way to fight against the impious and the adversary, but they have not the art of butchering the good man and the fellow-citizen. We recollect*



*cives arma sumpsisse. Pugnavimus semper pro justitia, pro pietate, pro innocentium salute: hæc fuerunt hactenus pretia periculorum. Pugnavimus pro fide, quam quo pacto conservemus tibi (ad imperatorem sermo est) si hanc Deo nostro non exhibemus?* Basilii de antiquioribus Christianis sic loquitur: τοὺς ἐν πολέμοις φόνους οἱ πατέρες ἡμῶν ἐν τοῖς φόνοις οὐκ ἐλογίσαντο, ἐμοὶ δοκεῖ, συγγνώμην δόντες τοῖς ὑπὲρ σωφροσύνης καὶ εὐσεβείας ἀμυνομένοις: *Eas quæ in bello perpetrantur cædes, majores nostri pro cædibus non habuere, excusatos habentes eos, qui pro pudicitia ac pietate decertant.*

\* *Pro pudicitia* etiam habet interpres vulg. *Epist. ad Amphiloeh.* unde hæc petita sunt, *Cap. 13, pag. 26 D.* Tom. III. *Ed. Paris. 1638.* Sed vide-

tur hæc vox latiore heic habere significationem. Cæterum vide quæ diximus in Libro Gallico *De Doctrina Morali Patrum*, Cap. xi. § 1, et seqq. *J. B.*

---

*that we have taken arms for our citizens rather than against them. We have always fought for justice, piety, the protection of the innocent; those have hitherto been the rewards of our labours. We have fought for our faith: and how shall we preserve our faith towards thee (meaning the Emperor), if we do not shew our faith towards God?*

[The quotation from Basil seems an after-thought.]

---

## CAPUT III.

### BELLI PARTITIO IN PUBLICUM ET PRIVATUM. SUMMI IMPERII EXPLICATIO.

- |   |   |
|---|---|
| <p>I. <i>Belli divisio in publicum et privatum.</i></p> <p>II. <i>Non omne bellum privatum, post judicia constituta, illicitum esse jure naturali, defenditur; additis exemplis.</i></p> <p>III. <i>Ac ne jure quidem Evangelico, cum solutione objectionum.</i></p> <p>IV. <i>Belli publici divisio in solenne et minus solenne.</i></p> <p>V. <i>An bellum sit publicum, quod geritur auctoritate magistratus summam potestatem non habentis, et quando.</i></p> <p>VI. <i>In quibus rebus consistat potestas civilis.</i></p> <p>VII. <i>Quæ potestas sit summa.</i></p> <p>VIII. <i>Refellitur sententia, quæ statuit summam potestatem semper esse penes populum: et solvuntur argumenta.</i></p> <p>IX. <i>Refellitur sententia, quæ statuit semper mutuam subjectionem regis et populi.</i></p> <p>X. <i>Ad veram sententiam recte intelligendam adhibentur cautiones: prima est de distinguenda vocum similitudine in re dispari:</i></p> <p>XI. <i>Secunda de distinguendo</i></p> | <p style="text-align: right;"><i>jure et modo habendi jus.</i></p> <p>XII. <i>Ostenditur quædam imperia summa haberi plene, id est alienabiliter:</i></p> <p>XIII. <i>Quædam non plene:</i></p> <p>XIV. <i>Quædam non summa plene, id est alienabiliter, haberi.</i></p> <p>XV. <i>Adstruitur dicta distinctio ex discrimine dandi tutoris in regnis.</i></p> <p>XVI. <i>Summam potestatem non tolli promissione etiam ejus, quod nec naturalis, nec divini sit juris.</i></p> <p>XVII. <i>Summum imperium dividi interdum per partes subjectivas aut potentiales.</i></p> <p>XVIII. <i>Male tamen hoc colligi ex eo, quod reges acta quædam sua nisi a cætu aliquo probentur, rata esse nolunt.</i></p> <p>XIX. <i>Alia quoque exempla quædam male huc trahi.</i></p> <p>XX. <i>Vera exempla.</i></p> <p>XXI. <i>Summam potestatem habere posse qui inæquali fœdere teneatur: cum solutione objectionum:</i></p> <p>XXII. <i>Et qui tributum pendat.</i></p> <p>XXIII. <i>Et qui fœdi lege teneatur.</i></p> <p>XXIV. <i>Distinctio juris et exercitii cum exemplis.</i></p> |
|---|---|

*Syl. Fædo Bellum, i. n. l.*

I. 1 **B**ELLI prima maximeque necessaria partitio hæc est, quod bellum aliud est privatum, aliud publicum, aliud mixtum. Publicum bellum est, quod auctore eo geritur,

#### CHAPTER III. *Division of War into public and private.*

##### *Explanation of Sovereignty.*

I. 1 The first and most necessary partition of War is this, that War is private, public, or mixt. Public war is that which it carried

qui jurisdictionem habet: privatum, quod aliter: mixtum, quod una ex parte est publicum, ex altera privatum. Sed de privato, quod antiquius, primum videamus.

2 Bellum aliquod privatum licite geri, quantum jus naturæ attinet, satis apparere arbitror ex iis quæ supra diximus, cum ostensum est, ut quis injuriam etiam vi a se arceat, juri naturali non repugnare. Sed forte putet aliquis id saltem post constituta judicia publica non licere: quanquam enim judicia publica non a natura, sed a facto sunt humano, cum tamen multo sit honestius et ad quietem hominum conducibilius, ab eo cujus nihil intersit rem cognosci, quam homines singulos, nimium sæpe amantes sui, quod jus putant id manu exsequi, tam laudabili instituto obsequendum ipsa dictat æquitas et ratio naturalis. Paulus JC: *Non est singulis concedendum quod per magistratum publice possit fieri, ne occasio sit majoris tumultus faciendi.* Hinc est, inquit <sup>a</sup>Rex Theodoricus, *quod legum reperta est sacra reverentia, ut nihil manu, nihil proprio ageretur impulsu; quid enim a bellica confusione pax tranquilla distat, si per vim litigia terminantur?* Et vim vocant leges, *quoties quis id, quod deberi sibi putat, non per judicem reposcit.*

L. Non est  
de R. J. 176.

Cass. 1. iv.  
Var. Epist.  
10.

L. Exst. 13.  
D. quod  
metus.

II. 1 Certe quin restricta multum sit ea, quæ ante judicia constituta fuerat licentia, dubitari non potest. Est tamen

<sup>a</sup> Rex Theodoricus] Eundem vide in Edicto cap. x. et cxiv.

on under the authority of him who has jurisdiction; private, that which is not so; mixed, that which is public on one side and private on the other. Let us first speak of private war as the more ancient.

2 That private war may be lawful, so far as Natural Law goes, I conceive is sufficiently apparent from what has been said above, when it was shewn, that for any one to repel injury, even by force, is not repugnant to Natural Law [Chap. II.]. But perhaps some may think that after judicial tribunals have been established, this is no longer lawful: for though public tribunals do not proceed from nature, but from the act of man, yet equity and natural reason dictate to us that we must conform to so laudable an institution; since it is much more decent and more conducive to tranquillity among men, that a matter should be decided by a disinterested judge, than that men, under the influence of self-love, should right themselves according to their notions of right. So Paulus the Jurist, and king Theodoric. [See the passages.]

II. 1 It is not to be doubted, indeed, that the licence which existed before the establishment of public justice is much restricted.

ubi locum nunc quoque habeat, nimirum ubi cessat iudicium : nam lex vetans sine iudicio suum consequi, intelligi commode debet, ubi copia est iudicii. Cessat autem iudicium momentanee, aut continue. <sup>b</sup> Momentanee cessat, ubi expectari iudex non potest sine certo periculo aut damno. Continue vero, aut jure, aut facto. Jure, si quis versetur in locis non occupatis, ut mari, solitudine, insulis vacuis, et si qua alia sunt loca, in quibus nulla est civitas : facto, si subditi iudicem non audiant, aut iudex aperte cognitionem rejecerit.

Molln. Disp.  
100. § Du-  
bitans vero.

2 Quod diximus etiam post iudicia constituta naturali juri non repugnare omne bellum privatum, etiam ex lege Judæis data intelligi potest, ubi sic per Mosen Deus loquitur, Exod. xxii. 2. *Si in effossione deprehensus fur ita percutiatur, ut moriatur, ne reus cædis esto percussor, ni jam dies illuxerit, tunc enim reus cædis erit.* Omnino enim videtur hæc lex, tam accurate distinguens, non solum impunitatem inducere, sed jus etiam naturale explicare ; neque fundari in peculiari aliquo mandato divino, sed in communi sequitate : unde alias etiam gentes id sequutas videmus. Notum est illud XII. Tabu-

<sup>b</sup> *Momentanee*] Servius ad x *Æneidos* (vers. 419) : *Injecere manum Parce. Traserunt debitum sibi. Et sermone usus est juris : nam manus injectio dicitur, quoties nulla iudicis auctoritate rem*

*nobis debitam vindicamus.*

<sup>c</sup> *Ex veteri jure Attico*] Solonis verba, [apud Demosthen. *Orat. adversus Timocrat.* pag. 476] : *Εἰ μὲν τις μεθ' ἡμέραν ὑπὲρ πενήκοντα δραχμῶν*

Yet still it continues to exist ; namely when public justice ends : for the law which forbids us to seek our own by other than judicial proceedings, must be understood to apply only when judicial aid can be had. Now judicial aid ceases either momentarily or continuously. It ceases momentarily when the judge cannot be waited for without certain danger or loss. It ceases continuously either *de jure* or *de facto* : *de jure*, if any one be in an unsettled place, as at sea, in a desert, in an uninhabited island, or in any other place where there is no political government : *de facto*, if the subjects do not obey the judge, or if the judge openly refuses to take cognizance.

2 What we have said, that even after judicial tribunals are established, all private war is not repugnant to Natural Law, may also be understood from the Jewish Law, in which God thus speaks by Moses, Exod. xxii. 2 : *If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him : if the sun be risen upon him, there shall blood be shed for him.* For this law, making so nice a distinction, appears not only to give impunity to the slayer, but to explain Natural Law ; and not to be founded in any peculiar divine mandate, but in

larum, haud dubie ex veteri jure Attico profectum: *Si nox furtum faxit, si im aliquis occisit, jure cæsus esto.* Sic insons omnium, quos novimus, populorum legibus judicatur, qui adversus aggressorem armis vitam periclitantem defenderit: qui tam manifestus consensus testimonium præbet, nihil in eo esse, quod naturali juri adversetur.

III. 1 De jure divino voluntario perfectiore, Evangelico scilicet, plus est difficultatis. Quin Deus, cui plus juris est in vitam nostram, quam nobis ipsis, potuerit a nobis patientiam eo usque exigere, ut etiam privatim in periculum adducti, occidi deberemus potius quam occidere, ego non dubito. An autem voluerit nos eo usque obstringere, id est quod inquirimus. Solent pro affirmante sententia adferri duo loca, quæ supra adduximus, ad quæstionem generalem: ἐγὼ δὲ λέγω ὑμῖν, μὴ ἀντιστῆναι τῷ κρηρῷ. *Ego autem dico vobis; Ne resistite injuriam facienti.* Matth. v. 39 et Rom. xii. 19. μὴ ἐαυτοὺς ἐκδικούντες, ἀγαπητοί, ubi Latina versio habet, *non vos defendentes, charissimi.* Tertius autem locus est in illis Christi verbis ad Petrum: *Repone gladium tuum in va-*

Macrob.  
Saturn. l. 4.

Matth. xxvi.  
52.

κλέπτοι, ἀπαγωγὴν πρὸς τοὺς ἑνδεκά εἶναι. εἰ δὲ τις νυκτὸς ὅ τι οὖν κλέπτη, τοῦτον ἐξείναι καὶ ἀποκτείνει. *Si quis de die quod plus quinquaginta drachmis valeat, furetur, eum jus sit*

*ad undecim viros deduci: quod si quis noctu vel minimum quid furetur, eum liceat vel occidere.* Adde quæ secundo, libro infra dicentur, cap. i. § 12.

common equity; and accordingly we find that other nations have followed the same. The Law of the Twelve Tables is well known, doubtless taken from the old Attic Law: *If a man commits a robbery by night, and if any one kill him, it is justifiable homicide.* And thus by the laws of all nations which we know, he is deemed innocent who defends himself being in peril of life; which manifest consent is a proof that such a course is not at variance with Natural Law.

III. 1 Concerning the more perfect Instituted Divine Law (Chap. i. § xv.), namely the Evangelical Law, there is more difficulty. That God, who has more Right over our lives than we ourselves have, might have demanded from us forbearance to such an extent, that even when brought privately into danger, we should be bound to allow ourselves to be killed rather than kill another, I do not doubt. The question is, whether he did intend to bind us to this. It is usual to adduce for the affirmative two passages which I have already quoted with reference to the general question: *I say unto you that ye resist not evil,* Matth. v. 39, and Rom. xii. 19, *Avenge not yourselves, dearly beloved.* A third passage is those words of Christ to Peter, (Matth. xxvi. 52), *Put up thy*

*ginam; nam quicumque acceperint gladium, gladio peribunt.* Addunt his nonnulli Christi exemplum, qui pro inimicis sit mortuus, Rom. v. 8, 10.

2 Neque desunt inter Christianos veteres, qui bella quidem publica non improbaverint, sed defensionem privatam putarint vetitam. Ambrosii loca pro bello supra attulimus. Augustini multo etiam plura sunt et clariora, omnibus nota. At idem Ambrosius dixit: *Et ideo fortasse Petro duos gladios offerenti, Satis, dicit, quasi licuerit usque ad Evangelium, ut sit in lege equitatis eruditio, in Evangelio veritatis.* Idem alibi: *Christianus, etiamsi in latronem armatum incidat, ferientem referire non potest; ne, dum salutem defendit, pietatem contamineat.* Augustinus vero: *Legem quidem non reprehendo, quæ tales (latrones et alios invasores violentos) permittit interfici, sed quomodo istos qui interficiunt defendam, non invenio.* Et alibi: *De occidendis hominibus ne ab eis quisquam occidatur, non mihi placet consilium, nisi forte sit miles, aut publica functione teneatur, ut non pro se hoc faciat, sed pro aliis, accepta legitima potestate.* Atque

Cap. preced.  
§ 10. n. 5.

Lib. x. in  
Lucam xxii.

De Qf. III. 3.

Lib. I de Lib.  
Arb. 5.

Rpist. 47, ad  
Publicolan.

<sup>a</sup> *Satis apparet*] Adde Consilii Aurelianiensis canonem, citatum a Gratiano c. ult. causa XIII. qu. 11.

<sup>e</sup> *Nobis potius quam aliis consulere*] Cassiodorus de Amicitia, [vel potius Petrus Blesensis, cui liber ille a Viris

---

*sword within the sheath, for all they that take the sword shall perish with the sword.* Some add to these the example of Christ, who died for his enemies, Rom. v. 8, 10.

2 Nor are there wanting among the ancient Christians, those who though they did not condemn public wars, thought that private self-defense was forbidden. We have already (Chap. II. § 10, No. 5) adduced the passages of Ambrose in defense of war: there are passages in Augustine more numerous and more clear, known to all. Yet the same Ambrose says, Perhaps when he said to Peter, who offered him two swords, *It is enough; it was as if he said, that the use of such weapons was lawful till the Gospel: the Law was a teacher of equity, the Gospel, of truth.* And the same writer in another place: *A Christian, if he should come in the way of an armed robber, may not return his blows; lest in defending his safety he should stain his piety.* And Augustine, *As to the law which permits such (robbers and other violent transgressors) to be put to death, I reprehend it not; but how I am to defend those who put men to death, I do not see.* And in another place, *As to putting men to death that other men may not be killed by them, I cannot approve of such deeds; except the agent be a soldier, or a public officer, or do this, not*

idem sensisse Basilium ex secunda ipsius ad Amphiloichium cap. 41 epistola <sup>d</sup>satis apparet.

3 Sed opposita sententia sicut receptior est, ita verior nobis videtur, ut talis patientia non sit in obligatione: jubemur enim in evangelio proximum amare juxta nos ipsos, non præ nobis ipsis: imo ubi par malum imminet, non vetamur °nobis potius quam aliis consulere, ut supra ostendimus auctoritate Pauli beneficentiæ regulam explicantis. Instet forte aliquis, et dicat; etiamsi meum bonum præferre possim bono proximi, hoc tamen locum non habere in bonis inæqualibus; quare vitam meam mihi potius deferendam, quam invasor permittatur incidere in perpetuam damnationem. Sed responderi potest, sæpe etiam eum, qui impetitur, opus habere tempore ad pœnitentiam, aut probabiliter ita existimare; et ipsi quoque aggressori ante mortem posse ad pœnitentiam spatium superesse. Deinde morali iudicio non videri æstimandum illud periculum, in quod ipsum se quis conjiciat, et unde se potest eximere.

4 Certe Apostolorum aliqui ad ultimum usque tempus, Christo vidente et sciente, videntur iter fecisse armati gladio,

*Doctis vindicatur]. Sane nullus aliquo præcepto vel aliqua ratione tenetur salutem anime proximi perditione anime sue,*

*aut corporis ejus liberationem, citra spem perpetuæ salutis, proprii corporis interitu procurare.*

*for himself, but for others, having received legitimate authority. And Basil was of the same opinion.*

3 But the opposite opinion, as it is the more common, so does it seem to us the more true, that such forbearance is not obligatory: for in the Gospel we are told to love our neighbour as ourselves, but not better than ourselves; nay even, when an equal evil impends over ourselves and another, we are not forbidden to consult our own safety rather than that of others, as we have shewn above from St Paul, when he explains the law of kindness. Perhaps some one may urge in reply, that though I may prefer my own good to the good of my neighbour, this does not hold of unequal goods: and that I must rather give up my life than that the aggressor should be permitted to fall into eternal damnation. But we may answer that the person attacked may also need time for repentance before he dies, or may think so on probable grounds, and that the aggressor may possibly have time for repentance before his death. But in truth we are not to estimate the moral consequences of a danger into which a man throws himself, and from which he can relieve himself.

4 Certainly the Apostles, even to the last, with the knowledge and under the eye of Christ, travelled armed with sword, which also other

Bell. Jud. II.  
12.

quod et alios Galilæos e patria urbem versus properantes ob infestas latronibus vias factitasse ex Josepho discimus: qui et de Essenis innocentissimis hominibus idem prodidit. Hinc enim factum est, ut cum diceret Christus tale tempus imminere, ut gladii comparandi causa vel vestis vendenda esset, Lucæ xxii. 36, statim Apostoli responderint in suo comitatu duos esse gladios: erant autem in eo comitatu nulli præter Apostolos. Tum vero illud ipsum, quod dixit Christus, quantum præceptum revera non continet, sed proverbium est, significans gravissima pericula imminere, ut clare ostendit oppositio primi temporis, quod tutum ac prosperum fuerat, comitate 35 est tamen tale, ut sumptum appareat ex eo, quod fieri solebat, quodque Apostoli licitum censebant.

Orat. pro  
Milon. 4.

5 Recte autem a Cicerone dictum est: *Gladios habere certe non liceret, si uti illis nullo pacto liceret.* Illud vero, *Ne resistite injuriam facienti,* non magis universale est quam quod sequitur, *Dare omni petenti;* quod tamen exceptionem admittit, dum ne nimium nos prægravemur: imo isti præcepto de dando nihil adjicitur quod vim habeat restringentem, sed ex solo sensu æquitatis adstringitur; cum præceptum de non resistendo suam habeat adjunctam explicationem per exemplum alapæ; ut intelligatur tum demum præcise nos obligare, cum

---

Galileans, travelling from their country to Jerusalem, did for fear of robbers, as we learn from Josephus; who says also that the Essenes, most blameless men, did the same. Hence when Christ said that a time was at hand such that men should sell a garment to buy a sword, Luke xxii. 36, the Apostles answered that they had two in that company: which company consisted of the Apostles alone. And though what was said by Christ, was in truth, not a command but a proverbial expression, signifying that most grave perils were impending, as clearly appears from the opposition of the former time, which had been safe and prosperous, verse 35, *When I sent you without purse, &c.;* yet it shews what was customary, and what the Apostles thought lawful.

Now it is rightly said by Cicero, that *It would not be lawful to carry a sword if it were not lawful under any circumstances to use it.*

5 The other passage, *Resist not evil,* is more universal than that which follows, *Give to every one that asketh:* which nevertheless admits of exception, namely, that we are not to overburthen ourselves. Nay more: This precept concerning giving has nothing added to it of a restrictive force, but is limited only by the sense of equity: whereas the precept, not to resist, has the explanation added in the example of a buffet on the cheek; that it may be understood to oblige us precisely





xxvi. 54.

apud Matthæum ait, *Quomodo ergo implerentur scripturæ, quæ dicunt ita oportere fieri?* Ulciscendi ergo animo Petrus, ut erat fervidus, non defendendi ferebatur: adde quod arma sumebat in eos, qui nomine publicarum potestatum adventabant, quibus an ullo casu resistere liceat, peculiaris est quæstio, infra a nobis peculiariter tractanda. Quod autem adjicit Dominus, *Omnes, qui gladium acceperint, gladio peribunt*, aut proverbium est, ex vulgi usu desumptum, quo significatur sanguinem sanguine elici, ideoque armorum usum periculo nunquam vacare: aut, quæ Origenis, Theophylacti, Titi, et Euthymii sententia est, indicat, non esse quod nos Deo præripiamus ultionem, quam ipse suo tempore satis sit exacturus: plane quo sensu in Apocalypsi dicitur xiii. 10. *Qui gladio occidit, eum gladio occidi oportet: in hoc sita est spes et patientia sanctorum*: quicum convenit Tertulliani illud: *Adeo satis idoneus patientiæ sequester Deus: si injuriam deposueris penes eum, ultor est; si damnum, restitutor est; si dolorem, medicus est; si mortem, resuscitator est: quantum patientiæ licet, ut Deum habeat debitorem?* Simulque his Christi verbis vaticinium videtur inesse de pœnis, quas a sanguinariis Judæis erat exacturus gladius Romanorum.

De Patient.  
1A.

8 Ad Christi exemplum, qui pro inimicis mortuus dicitur,

---

*fulfilled, which say that so it must be?* St Peter then, according to his fervid temper, was moved by the desire of revenge, not of defense. Add to this, that he was using weapons against those who came in the name of the public authorities: and whether these may in any case be resisted, is a peculiar question, to be specially treated hereafter. What the Lord adds, *All they that take the sword shall perish by the sword*, is either a proverb borrowed from common usage, which meant that blood leads to blood, and therefore that the use of arms is always full of peril; or, as is the opinion of Origen, Theophylact, Titus, and Euthemius, it denotes that we are not to take vengeance out of the hands of God, since it is what he will fully exact in his own time: and this is plainly expressed, Revelation xiii. 10, *He that killeth with the sword must be killed with the sword. Here is the patience and the faith of the saints.* And this agrees with what Tertullian says, *So sufficient is God, as one in whom our patience may trust: if we leave our injuries to him, he is our avenger; if our losses, our recompenser; if our pains, our physician; if our death, our restorer to life. What a privilege of patience it is to make God our debtor!* And at the same time the words of Christ seem to contain a prophecy of the punishment which the Roman sword was to exact from the sanguinary Jews.

responderi potest, Christi facta omnia quidem virtutis esse plena, et quæ, quoad ejus fieri potest, imitari laudabile sit, et suo præmio non cariturum; non tamen omnia ejusmodi esse, ut aut ex lege veniant, aut legem faciant. Nam quod Christus pro inimicis atque impiis est mortuus, id non fecit ex lege aliqua, sed ex speciali quasi pacto et fœdere inito cum Patre; qui si id faceret, non modo summam ei gloriam, sed et gentem in æternum duraturam promisit, *Essaiæ liii. 10.* Alioqui esse hoc factum quasi singulare, et cui vix quicquam reperitur simile, ostendit *Paulus Rom. v. 7.* Et Christus nos animam nostram periculis objicere jubet, non pro quibusvis, sed pro ejusdem disciplinæ consortibus, *1 Joan. iii. 16.*

9 Quæ vero ex Christianis scriptoribus allatæ sunt sententiæ, partim videntur consilium prægis, et sublimis propositi commendationem, quam dstrictum præceptum continere; partim privatæ sunt ipsorum, non communes totius Ecclesiæ. Nam in canonibus antiquissimis, qui Apostolici dicuntur, communiõne is demum privatur, qui in rixa primo ictu adversarium occiderit, *διὰ τὴν προπέτειαν αὐτοῦ, ὄβ nimium calorem.* Et hanc sententiam ipse etiam Augustinus, quem

Can. lxiv.

Vid. etiam c. si vero. de sent. excom. etc. signifi- casti. de homicidia.

[*Ob nimium calorem*] Ambrosius libro x. in Lucam: *O Domine, cur me amere jubes gladium, qui ferire me pro-*

*hibes? cur haberi præcipis quem vetas promi? nisi forte ut sit parata defensio, non ultio necessaria.* (Cap. 22).

8 With regard to the example of Christ, who is alleged to have died for his enemies, it may be answered, that all the acts of Christ are full of virtue, and such as may be laudably imitated, as far as is possible, and will not fail of their reward; but they are not all such as proceed from a law, or make a law for us. For that Christ died for his enemies and for the ungodly, was what he did not in pursuance of any law, but from a special covenant with his Father; who promised, on that condition, not only eternal glory, but also an endless offspring, *Isaiah liii. 10.* And so Paul describes this as a special and exceptional and unparalleled act, *Rom. v. 7: Scarcely for a righteous man will one die.* And Christ commands us to put our life in peril, not for any one, but for the brethren, *1 John iii. 16.*

9 As to the opinions adduced from Christian writers, partly they appear to be rather counsels, and the recommendation of an elevated purpose, partly they are the private opinions of those writers, not the common judgment of the Church. For in the very ancient Canons which are called Apostolic, he especially is excluded from the communion, who in a quarrel had slain his adversary at once, in heat of

in contrariam partem adduximus, probare videtur Quæst. lxxxiv. in Exodum.

IV. 1 Publicum bellum aliud est solenne ex jure gentium, aliud minus solenne. Solenne quod hic voco, plerumque justum dici solet eo sensu, quo justum testamentum codicillis, justæ nuptiæ servili contubernio opponuntur: non quod non liceat et codicillos facere ei qui velit, et servo secum mulierem<sup>1</sup> habere in contubernio; sed quod testamentum et nuptiæ solennes peculiare quosdam ex jure civili effectus habeant: quod notari utile est; multi enim, voce justis male intellecta, damnari putant ut iniqua aut illicita bella omnia, quibus illa justis appellatio non convenit. Ut bellum solenne sit ex jure gentium, duo requiruntur; primum ut geratur utrimque auctore eo, qui summam potestatem habeat in civitate: deinde, ut ritus quidam adsint, de quibus agemus suo loco. Hæc quia conjunctim requiruntur, ideo alterum sine altero non sufficit.

2 Bellum autem publicum minus solenne potest et ritibus illis carere, et geri in privatos, et auctorem habere magistra-

<sup>1</sup> *Habere in contubernio*] Imo inter cives erant quædam matrimonia non justa, non justis liberi. Paul. *Sent. Lib.* II. tit. xix. l. Si uxor. 13. D. ad L. Juliam de Adulteriis: sic et libertas quædam non justa. Seneca *De Vita Beata*, c. xxiv. Suetonius *Octavio*, c. xl. [Locus Pauli Icti male heic addu-

citur, quasi in eo esset exemplum *matrimonii non justis*, eo sensu, quo intelligit Auctor: et ipse infra, in not. ad Lib. II. cap. v. § 15. num. 1. suspicatur, latere additamentum *Aniani*. Sed vide ibi eximium Editorem *Jurisprudentia Antejustinianæ*, Clar. SCHULTINGIUM. Circa *Uxorem injustam*, de qua in L. 13.

blood. And this opinion Augustine, whom we have quoted on the opposite side [§ II. No. 2], appears to approve.

IV. [And now of Public War.] 1 Public War is either formal, according to the Law of Nations, or less formal. What I here call formal, is commonly called legitimate, in that sense in which a legitimate will is opposed to a codicil, and a legitimate marriage, to the cohabitation of slaves: not that a man may not lawfully make codicils, or a slave cohabit with a woman; but because a Will and a Marriage have peculiar effects by the Civil Law, which it is important to note. For many, not understanding the word *legitimate*, think that all wars which are not legitimate are unlawful and unjust. In order that a war may be formal according to the Law of Nations, two things are required; first, that it be carried on on both sides by the authority of those who have a political sovereignty; next, that certain formalities be employed, of which we shall speak in their place. Since both these conditions are requisite, one alone without the other is not sufficient.

2 An informal public war may both want those formalities, and be

tum quemvis. Et sane si citra leges civiles res spectetur, videtur omnis magistratus, sicut ad tuendam plebem sibi creditam, ita ad exercendam jurisdictionem, si vis occurrat, jus habere belli gerendi. Sed quia ex bello tota civitas in periculum venit, ideo ferme omnium populorum legibus cautum est, ne bellum geri possit nisi auctore eo, qui summam in civitate potestatem habeat. Exstat lex talis Platonis ultimo de legibus. Et in Romano jure majestatis teneri dicitur, qui injussu Principis bellum gesserit delectumve habuerit, exercitum comparaverit. Injussu populi dixerat lex Cornelia lata a L. Cornelio Sylla. In Justiniano Codice exstat constitutio Valentiniiani, et Valentis; *Nulli prorsus nobis insciis atque inconsultis quorumlibet armorum movendorum copia tribuatur.* Huc pertinet illud Augustini: *Ordo naturalis mortaliū paci accommodatus hoc poscit, ut suscipiendi belli auctoritas atque consilium penes principes sit.*

Pag. 955. n.c.

L. III. D. ad l. Jul. maj.

Ut armorum inscio Principe, interdicitur sit, Leg. Unic.

3 Sicut autem omnia dicta, quantumvis universalia, æquitatem recipiunt interpretem, ita et hæc lex. Nam primum

Vict. de Jur. Bell. n. 2.

D. Ad Leg. Jul. de Adult. et alibi, varias Interpretum sententias collegit et expendit CHR. ULRIC. GRUPEN, *De Uxore Romana*, cap. vii. § 9, pag. 338, et seqq. Quod spectat *Libertatem non justam*, consule TORRENTIUM, in locum Suetonii laudatum: JUST. LIPSIUM in Tacit. *Annal.* XIII. 27, et Eruditissimi

NOODTII Comment. in *Digest.* Tom. II. Opp. pag. 21. J. B.

§ *Illud Augustini* Lib. XXII. c. lxxiv. contra Faustum: citat. Gratianus c. quid culpatur, 4. causa XXIII. quæst. 1. Apud Hebræos bellum omne, quod non speciali Dei jussu suscipitur, vocatur בלחמת ה' bellum potestatum.

made against private persons, and by the authority of any magistrate. And if we look at the matter without reference to civil laws, it would seem that every magistrate has the right of making war, both to protect the subjects committed to his charge, and to exercise his jurisdiction, if opposed by force. But because by war the whole State is brought into danger, therefore it is provided by the laws of almost every nation, that war is not to be made except by the authority of the Sovereign Power. Plato has such a provision in the last book of his *Laws*. And in the Roman Law, he was held guilty of high treason who without the authority of the Sovereign made war, levied troops, or formed an army: the Cornelian law said, without authority of the People. So it is in the Codex of Justinian: and so argues Augustine. [See the text.]

3 But as all precepts, however universal, are to be interpreted according to equity, so is this law. For in the first place, there can be no doubt that he who is at the head of any jurisdiction may, through the officers of his court, compel by force a few contumacious persons

*Molin. Disp.*  
110. § 10em.  
*Vic. Berol. in*  
*l. ex hoc Jure*  
*D. de Just. et*  
*Jur. Bart.*  
*de Repræs. 3.*  
*Principali ad*  
*Secund. n. 6.*  
*Mart. Laud.*  
*de Bell. q. 2.*

*Livius. xlii.*  
30.

quin ei qui jurisdictioni præest liceat per apparitores suos vi cogere paucos imparentes, <sup>2</sup>quoties ad eam rem copiis majoribus opus non est, nec periculum imminet civitati, dubitari nequit. Rursum, si ita præsens sit periculum, ut tempus non ferat eum consuli qui supremum in civitate jus habeat; hic etiam necessitas exceptionem porriget. Hoc jure usus L. Pinarius præsidio Ennæ in Sicilia præfectus, cum certo sciret oppidanos ad Carthaginenses defectionem moliri, cæde in eos facta, Ennam retinuit. Extra talem necessitatem ad vindicandas injurias, quas Rex persequi negligit, jus bellandi oppidanis in civitatibus dare ausus est Franciscus Victoria: sed ejus sententia merito ab aliis repudiatur.

V. 1 At quibus eventibus jus armorum movendorum esse magistratibus minoribus constat, an bellum tale publicum sit dicendum, dissentiunt juris interpretes. Sunt qui aiunt. Sunt qui negant. Sane si publicum non aliud dicimus quam quod fit jure magistratus, dubium non est quin talia bella publica sint, ac proinde qui in tali facti specie magistratibus

*Apola de Jur.*  
*Bell. l. 2. n. 7.*  
*Sil. Verb.*  
*Bell. n. 2. 60i.*  
*sufficit etiam.*  
*Innoc. c. olim*  
*de Rest. Spol.*  
*n. 6. etc.*  
*sicut de Jure*  
*Jur. n. 6.*  
*Favor. ibid.*  
*Baro. ad l.*  
*Host. D. de*  
*Captiv.*

<sup>2</sup> Hinc l. 68. *D. De rei vindicat.* dicitur, eum, qui restituere jussus, *Judicis non paret, manu militari, officio Judicis,* cogendum. Qua de re vide *Viros Eruditissimos et Juris peritissimos, JAC. GOTHOFREDUM* in *Cod. Theodos. l. unic. de Offic. Jud. milit. et*

*Ampliss. BYNCKERSHOEK, Observat. III. 14. J. B.*

<sup>h</sup> *Res aufferri obsistentibus*] *Juriconsultis* in hanc rem productis possunt addi *Franc. Aret. cons. xiv. n. 7. Gail. r. de Pac. publica, c. 11. numer. 20. Cardinalis Tuschus pract. quæst. LV.*

to obey him, when there is no need of major force for the purpose. And again, if the danger be present and pressing, so that there is no time to consult the Sovereign, here also necessity makes an exemption. On the ground of such a right as this, L. Pinarius, the commander of the garrison of Enna, being aware that the townsmen had the intention to revolt and join the Carthaginians, by a sudden onslaught on them kept possession of the town. And even without great necessity, in order to obtain satisfaction for injuries which the king neglects to prosecute, Francis Victoria gave the citizens of towns the right of making war. But this opinion is deservedly repudiated by others.

V. 1 In what events the right of using arms is to be allowed to subordinate magistrates, and whether such a war is to be called a public war, the Jurists differ. Some affirm, some deny. If indeed we call that *public* which is done by the authority of the magistrate, there can be no doubt that such wars are public wars; and that therefore those who in such cases oppose the magistrates, incur the punishment of contumacy against their superiors. But if *public* be taken in a higher

se opponunt, in pœnas incidant contumaciam adversus supra se positos. Si vero publicum sumitur in excellentiore significatione pro eo quod solenne est, ut sæpe sumi extra controversiam est; non sunt bella ista publica, quia ad istius juris plenitudinem, tum iudicium summæ potestatis, tum alia requiruntur. Neque me movet, quod etiam in tali contentione soleant <sup>b</sup>res auferri obsistentibus, ac militibus etiam concedi. Nam id belli solennis non ita proprium est, ut non alibi etiam locum habere possit.

2 Sed et illud accidere potest, ut in imperio late patente <sup>1</sup>inferiores potestates belli inchoandi concessam habeant potestatem: quod si fit, jam sane censendum erit bellum geri ex vi summæ potestatis: nam quod faciendi quis alii jus dat, ejus ipse auctor censetur.

3 Illud magis controversum, an ubi tale mandatum non est, sufficiat conjectura voluntatis. Mihi id admittendum non videtur. Neque enim hoc sufficit videre, quid hoc rerum statu summam potestatem habenti, si consulatur, placiturum

litera n. verbo *Bellum*. numer. 10. Gœdæus cons. Marp. xxviii. numer. 202, et sequentibus.

<sup>1</sup> *Inferiores potestates belli gerendi habeant potestatem*] Vide legem Fridrici Imperatoris apud Conradum Abbatem Uspergensem. [De hac Lege vide

quæ habet J. Hertius, in Dissert. *De superioritate territoriali*, § 31. *Comment. et Opuscul.* Tom. II. p. 266 et seqq. Adde exempla alia, quæ ego adtuli in *Vindiciis Juris Societatis Belgicæ ad Commercia Indicana*, Gallice scriptis, *cap. ult. J. B.*

*Liv. d. loc.*  
*Vict. n. 2.*  
*Cajet. sec. qu.*  
*40. art. 1.*  
*Silv. Verb.*  
*Bell. p. 1. n. 3.*  
*Lorca Disp.*  
*50. n. 12.*

sense, for that which is formal, as beyond controversy it often is, those are not public wars; for the full right of public war requires both the authority of the Sovereign and other conditions. Nor is this disproved by the fact that in such struggles men have their goods taken from them, and licence is granted to soldiers: for those features are not so peculiar to public war that they may not have place in other cases.

2 But this too may happen; that in an extensive empire, the subordinate powers may have, as a matter conceded to them, the right of making war: and if this be the case, the war must then be considered as made by authority of the Sovereign power; for when a superior gives another the right of doing anything, it is held to be done by the authority of the giver.

3 A more difficult controversy is, whether, when there is no such mandate, a conjecture of the will of the Sovereign be sufficient. To me it seems that this is not to be admitted. For in this state of things, it is not enough to consider, What would be the wish of the Sovereign if he were consulted: but rather this: What the Sovereign, in the

sit: sed hoc magis videndum, quid ille, ubi res moram fert, aut dubiam habet deliberationem, se inconsulto cupiat fieri, si ea de re lex ferenda sit. Nam ut maxime in aliquo facto particulari cesset inspecta particulariter ratio, quæ voluntatem summi imperantis movet, non tamen cessat ratio sumta universaliter quæ periculis occurri vult: quod fieri non potest, si ejus rei ad se magistratus quisque judicium trahat.

*Liv. xxxviii.  
46, seqq.*

4 Non ergo injuria a legatis suis accusatus fuit Cn. Manlius, quod Pop. Rom. injussu bellum Gallo-Græcis intulisset: nam quanquam in Antiochi exercitu Gallorum legiones fuerant, tamen pace facta cum Antiocho, an ea injuria in Gallo-Græcos exsequenda esset, non in Cn. Manlii, sed in Pop. Rom. arbitrio esse debuit. C. Cæsarem, quod bellum Germanis intulisset, <sup>3</sup>dedi Germanis Cato voluit; credo non tam jus respiciens, quam quod imminentis domini metu vellet urbem liberari. Nam Germani Gallos populi Romani hostes adjuverant, ac proinde non erat quod injuriam sibi factam quererentur, si modo justa fuit populi Romani causa in Gallos bellandi.

<sup>3</sup> Non ideo Cæsarem dedi Germanis, voluit Cato: sed quod, adversus fidem datam, Germanos prælio laccessivisset, eorumque legatos retineri jussisset; ut refert PLUTARCHUS, ex Historico vetere

Latino Tanusio Gemino, *Vit. Cæsar.* Tom. II. p. 718, z. et alibi, pag. 567, b. item APPIANUS, *Excerpt. Legat. Fulv. Urrin.* num. 16, pag. 353, 354. quamquam Cæsar ipse, in *Commentariis suis,*

case when the business admits of delay, or is of doubtful prudence, would wish to be done without consulting him, if a general rule on this subject were to be established. For however in any particular case the reason [for consulting the Sovereign] may seem to vanish on examination, the general rule of not incurring the dangers [which arise from not doing so] does not cease to have weight: and this cannot be done, if every [subordinate] magistrate judges for himself in such cases.

4 [Examples.] Thus Cn. Manlius was rightly accused by his officers of having made war on the Gallo-Grecians without the command of the Roman people: for though there had been legions of those Galli in the army of Antiochus, yet, peace being concluded with Antiochus, the question whether that offence was to be further visited upon the Gallo-Grecians was to be decided by the Roman people, not by Cn. Manlius. [Again] because Cæsar had made war on the Germans, Cato advised that he should be given up to the Germans: but in this; I conceive that he did not think of Right so much as wish the city to be delivered from the fear of a master. For the Germans had assisted the Gauls, the enemies of the Romans, and therefore there was an injury



At Cæsar contentus esse debuit Germanos Gallia mandata sibi provincia pepulisse, nec Germanos, præsertim cum nullum inde periculum immineret, intra suos fines bello persequi, nisi consulto prius populo Romano. Non ergo Germani jus habebant deditionem postulandi, sed populo Romano punire Cæsarem jus erat, plane ut Carthaginenses Romanis responderunt. *Ego non, privato publicone consilio Saguntum oppugnatum sit, quærendum censeo; sed utrum jure an injuria: nostra enim hæc quæstio atque animadversio in civem nostrum est, nostro an suo fecerit arbitrio: vobiscum una disputatio est, licueritne per fœdus fieri.*

Liv. xxi. 12.

5 Defendit M. Tullius Cicero factum et Octavii et Decimi Bruti, qui privato consilio in Antonium arma ceperant. Atqui, etiam si constaret meritum hostilia Antonium, Senatus populique Romani judicium exspectari debuit, an e republica esset dissimulare factum, an ulcisci, ad pacis venire conditiones, an ad arma procurrere. Nam jure suo, quod sæpe cum damni periculo conjunctum est, uti nemo cogitur. Tum

colorem huic perfidiæ querit, *Bell. Gall. Lib. iv. cap. xi. et seqq.* Deinde Auctor noëter heic confundit prelium commissum adversus Uisipetes et Tenchteros, antequam Cæsar primum ponte Rhenum

trajiceret, cum victoria, fere biennio post de *Treviris* relata, et de qua ipse agit, *Bell. Gall. vi. 9.* Plura in *Notis Gallicis* dicemus. *J. B.*

to complain of, if the Romans had just cause for their war against the Gauls. But Cæsar, when he had had Gaul assigned him as a province ought to have been content to expel the Germans from it, and ought not, without having any danger on that side, to have followed the Germans within their own frontier, without first consulting the Roman people. Hence the Germans had not the right of demanding that Cæsar should be surrendered to them, but the Romans had the right of calling Cæsar to account. So the Carthaginians answered the Romans in a similar case; [when Hannibal had besieged Saguntum.] *I do not conceive that the question between us is whether Saguntum was besieged by private or by public authority, but whether the siege was justifiable or not. For it is a question between us and our officer whether he acted by our authority or his own; our dispute with you is, whether the treaty allowed the act.*

5 Cicero defends the act both of Octavius and of Decimus Brutus who of their own motion made war upon Antony. But, even if Antony had deserved to be treated hostilely, the decision of the Senate and the people should have been waited for, whether it was for the interest of the State to overlook the act [of Antony] or to avenge it;

*App. Bel.  
Civ. Lib. I.  
p. 627.*

vero etiam, hoste judicato Antonio, permittenda Senatui et populo Romano deliberatio fuit, per quos potissimum bellum id geri vellet. Sic Cassio auxilia ex foedere potenti respondere Rhodii, missuros se, si Senatus juberet.

6 Moniti hoc exemplo, et plura occurrent, meminerimus non omnia probare, quæ a quamvis præclaræ famæ auctoribus dicuntur: sæpe enim tempori, sæpe affectibus serviunt, et aptant τῷ πέρῃ στάθμῃ. Quare danda est opera uti in his rebus defecato utamur judicio, nec quæ excusari magis quam laudari possunt, temere in exemplum rapiamus, in quo perniciose errari solet.

7 Cum vero dictum sit, bellum publicum geri non debere, nisi eo auctore, qui summam potestatem habeat, et ad hujus rei, et ad quæstionis illius, quæ est de bello solenni intellectum, atque adeo ad alia multa, necessarium erit, quæ sit summa illa potestas, quique eam habeant, intelligere: eoque magis, quia nostro sæculo viri eruditi, quisque ex usu magis rerum præsentium, quam ex vero illud argumentum exsequuti, rem per se haud expeditam multo impeditiorem reddiderunt.

<sup>k</sup> *Magistratibus*] Posset etiam verti *Vectigalibus*, quomodo accepit Thucydidas Scholiastes. Est enim vox an-

ceps.

<sup>l</sup> *Jus legum condendarum et tollendarum, jus decernendi de bello ac pace*

to treat for peace, or to rush into arms. For no one is bound to use his Right to his own loss. And if Antony was judged a public enemy, it was for the Senate and people to determine by whom the war was to be conducted. So when Cassius asked the Rhodians for soldiers to help him according to their treaty, they replied that they would send them if the Senate ordered them.

6 Warned by this and other examples, we must recollect not to give our approval to everything which is said by authors, even of great name; for they are often governed by the time, or by partial affections, and stretch their measure to their block. We must endeavour to form a clear and unbiassed judgment, and avoid setting up as examples cases which ought to be excused rather than praised.

7 Since then it is said that a public war must not be carried on except by the authority of the person in whom the Sovereignty resides; it will be necessary, for the understanding of this question, and in order to decide other points concerning war, that we should understand what this Sovereignty is, and who has it; and this all the more, inasmuch as learned men, in our time, arguing the question rather with a view to some present object than according to the truth, have made a subject, in itself not simple, still more entangled.

VI. 1 *Facultas ergo moralis civitatem gubernandi, quæ potestatis civilis vocabulo nuncupari solet, a Thucydide tribus rebus describitur, cum civitatem, quæ vere civitas sit, vocat αὐτόνομον, αὐτόδικον, αὐτοτελήν, suis utentem legibus, judiciis, magistratibus. Aristoteles tres facit partes in administratione republica, consultationem de rebus communibus, curam legendorum magistratuum, et judicia: ad primam autem partem refert deliberationem de bello, pace, fœderibus faciendis ac dissolvendis, de legibus; addit de morte, exilio, publicatione, et repetundis, hoc est, ut ego interpretor, judicia publica; cum prius judiciorum nomine privata intellexisset. Dionysius Halicarnassensis tria maxime notat, jus magistratuum creandorum, jus legum condendarum et tollendarum, jus decernendi de bello ac pace. Alibi addit quartum, judicia. Rursum, alibi adjicit curationem sacrorum et convocationem comitiorum.*

Lib. v. 12.

Pollic. Lib. IV. 14.

Lib. IV. 20.

Lib. VII. 56.

Lib. II. 14.

2 *At si quis recte partiri velit, facile quæ huc spectant reperiet omnia; ita ut nihil aut desit, aut redundet. Nam qui civitatem regit, eam partim per se, partim per alios regit. Per se autem versatur aut circa universalialia, aut circa singu-*

Servius ad 1. *Æneid.* (vers. 236). *Omni significet omni potestate, pace, legibus, ditione. Rectius omni quam omnis: ut bello.*

VI. [Of Sovereignty.] 1 *The Moral Faculty or Attribute of governing a state, which is commonly called the Civil Power, is described in Thucydides by three characters, when he says that a city is αὐτόνομος, αὐτόδικος, αὐτοτελής; has its own laws, tribunals, and magistrates. Aristotle makes three parts of the administration of the State; consultation concerning public affairs, election of magistrates, and administration of justice. To the first part he refers deliberation concerning peace, war, treaties, laws; he adds the infliction of death, or exile, forfeiture, bribery; that is, as I interpret him, public offences, having before spoken of the administration of justice in private cases. Dionysius of Halicarnassus notes three points especially; the Right of creating magistrates, the Right of making and abrogating laws, and the Right of deciding on war and peace: and again in another place he adds the care of sacred things, and the convocation of the assemblies.*

2 *We may easily divide this subject in such a way that there shall be neither defect nor redundance. He who rules the State serves it partly by himself, partly by others. By himself, he is either employed about general matters, or about particular. He is employed about general matters, in making laws and in rescinding them; both with regard to sacred subjects (so far as the care of those belonging to the*

laria. Circa universalia versatur condendo leges, easque tollendo, tam circa sacra (quatenus eorum cura ad civitatem pertinet) quam circa profana. Ars circa hæc Aristoteli ἀρχιτεκτονική, architectalis. Singularia, circa quæ versatur, sunt aut directe publica, aut privata quidem, sed quatenus ad publicum ordinantur. Directe publica sunt actiones, ut pacis, belli, fœderum faciendorum; aut res, ut vectigalia, et si quæ his sunt similia: in quibus comprehenditur et dominium eminens, quod civitas habet in cives, et res civium ad usum publicum. Ars circa hæc Aristoteli nomine generis πολιτική, id est civilis, et βουλευτική, consultatrix. Privata sunt res controversæ inter singulos, quas publica auctoritate dirimi publicæ quietis interest. Ars circa hæc eidem Aristoteli δικαστική, judicialis. Quæ per alterum expediuntur, ea expediuntur aut per magistratus, aut per alios curatores, in quibus sunt et legati. His ergo in rebus consistit potestas civilis.

VII. 1 Summa autem illa dicitur cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint reddi. Alterius cum dico, ipsum excludo, qui summa potestate utitur; cui voluntatem mutare licet, <sup>m</sup>ut et

<sup>4</sup> Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. VII. cap. vi. J. B.  
<sup>m</sup> Ut et successorem] Cacheranus  
*Decis. Pedem.* CXXXIX. num. 6.

<sup>5</sup> Vide infra, Lib. II. cap. ix. § 8. J. B.  
<sup>6</sup> Confer PUFENDORF. *De Jur. Nat. et Gent.* Lib. VII. cap. v. § 16, et seqq.

State) and secular. The particular matters about which he is employed are either directly public, or private, but with a reference to the public. Directly public, are public acts, as making war, peace, treaties; or money matters, as taxes and commercial duties and the like; among which is comprehended that *dominium eminens* which the State has for public uses, over its citizens and the property of its citizens. This act is by Aristotle called by the general name πολιτική, that is civil, and βουλευτική, deliberative. Private matters are controversies between individuals which the public interest requires to be settled by public authority. The art which deals with them is called δικαστική, judicial. The part of government which is executed by others, is executed either by magistrates, or by other commissioned persons, among whom are ambassadors. And in these things consists the Civil Power.

VII. 1 That Power is called *Sovereign*, whose acts are not subject to the control of another, so that they can be rendered void by the act of any other human will. When I say *any other*, I exclude the Sovereign himself, who may change his determination, as may his suc-

successorem, qui eodem jure utitur, ac proinde eandem habet potestatem, non aliam. Hæc ergo summa potestas quod subjectum habeat, videamus. Subjectum aliud est commune, aliud proprium: ut visus subjectum commune est corpus, proprium oculus: ita summæ potestatis subjectum commune est civitas, quam perfectum cœtum esse supra diximus.

2 Excludimus ergo populos, qui in alterius populi ditio- nem concesserunt, quales erant provinciæ Romanorum: hi enim populi non per se civitas sunt, ut nunc quidem eam vo- cem sumimus, sed membra minus digna magnæ civitatis, quo- modo servi membra sunt familiæ. Rursum accidit, ut plurium populorum idem sit caput, qui tamen populi singuli perfectum cœtum constituunt: neque enim ut in naturali corpore non po- test caput unum esse plurium corporum, ita in morali quoque corpore; nam ibi eadem persona diversa ratione considerata caput potest esse plurium ac distinctorum corporum. <sup>¶</sup>Cujus rei certum indicium esse potest, quod extincta domo regnatrice imperium ad quemque populum seorsim revertitur. Sic etiam accidere potest, ut plures civitates arctissimo inter se fœdere colligentur, <sup>¶</sup>et faciant *σύστημα* quoddam, ut Strabo <sup>7</sup>non uno loco loquitur, neque tamen singulæ desinant statum perfectæ

*¶* *Vict. de Jur. Bell. n. 7.*

ubi fuse de his systematibus civitatum agit. *J. B.*

*tyonibus*, Lib. ix. pag. 420. Ed. Paris. Casaub. *De Lyciis*, Lib. xiv. pag. 664.

<sup>7</sup> Vide, exempli gratia, de *Amphic-*

cessor who has the same authority, and therefore the same power, not another power. Let us see then in what *subject* this Sovereign power resides. The subject in which a power resides is either common or special; as the common subject in which the sight resides is the body, but the special subject is the eye. And in like manner the common subject in which the Sovereignty resides is the State, which we have before described as a perfect [independent] community.

2 We exclude therefore peoples which have put themselves in sub- jection to another people, such as were the provinces of the Romans. Such peoples are not by themselves a State, as we now take that word, but the inferior members of a great State, as servants are members of a family. Again, it sometimes happens that several peoples have the same head, though each of these peoples constitutes a perfect community; for though several bodies cannot have one head in the natural body, they may in the moral body; for there, the same per- son may be separately regarded as the head in his relation to different bodies. Of which there may be a certain indication in this, that when the reigning house is extinct, the right of government reverts to

Pol. II. 20;  
lit. 2.

civitatis retinere: quod tum ab aliis, tum ab Aristotele etiam notatum est non uno loco.

3 Subjectum ergo commune summæ potestatis esto civitas, ita ut jam diximus intellecta. Subjectum proprium est persona una pluresve, pro cuiusque gentis legibus ac moribus: ἡ πρώτη ἀρχὴ apud Galenum libro sexto de placitis Hippocratis et Platonis.

VIII. 1 Atque hoc loco primum rejicienda est eorum opinio, qui ubique et sine exceptione summam potestatem esse volunt populi, ita ut ei reges, quoties imperio suo male utuntur, et coercere, et punire liceat: quæ sententia quot malis causam dederit, et dare etiamnum possit, penitus animis recepta, nemo sapiens non videt. <sup>6</sup>Nos his argumentis eam refutamus. Licet homini cuique se in privatam servitutem cui velit addicere, <sup>7</sup>ut et ex lege Hebræa et Romana apparet: quidni ergo populo sui juris liceat se unicipiam, aut pluribus ita addicere, ut regendi sui jus in eum plane transcribat, nulla ejus juris parte retenta? Neque dixeris minime id præ-

Mod. XXI. 6  
Institut. de  
Jur. Pers.  
§ Servi au-  
tem 4.  
Gell. II. 18.

<sup>6</sup> De vero statu hujus questionis, et quid circa eam statuendum sit, ut extrema, in quæ plerique Auctores incidunt, vitentur, diximus in Notis Gallicis: vide et quæ dudum scripsimus ad PUFENDORF. *De Jur. Nat. et Gent.* Lib. VII. cap. vi. § 5. not. 2. *J. B.*

<sup>7</sup> Locum Auli Gellii, in margine positum, quo Auctor noster tacite innuere voluit, apud Græcos olim licuisse quoque singulis se ipsos vendere, emenda-

vimus quoad numerum capitum, ex *Flo- rum Sparsione ad Jus Justinian.* p. 14. ed. Amst. Sed et ille male huc aptatur, ut ad Gellium observavit Gronovius, qui heic silet. Auctor noster aufert ipse alium locum haud dubium, Lib. II. cap. v. § 27. n. 1. *J. B.*

<sup>8</sup> Sed quid jure fieri possit] Gall. de *Arrestis*, cap. vi. n. 22, et seqq.

<sup>9</sup> Aut illa cum his amittenda sunt] Cicero, Lib. III. de *Legibus*: Est ini-

each people separately. And thus it may happen that several States are combined in a close federal connexion, and make one *System*, and yet each is a separate State. [Strabo, Aristotle.]

3 Therefore the common subject of Sovereignty is the State, understood in the way we have described. The special subject is one or more persons according to the laws and customs of each nation.

VIII. 1 And here we must first reject their opinion who say that the Sovereignty everywhere belongs to the People; so that it has the power of controlling kings, and of punishing them if they abuse their power. What evil this opinion has caused, and may cause, any wise man may see. We refute it with these arguments.

A man may by his own act make himself the slave of any one: as appears by the Hebrew and the Roman law. Why then may not a people do the same, so as to transfer the whole Right of governing it

Liv. vii. 31. modum: *Populum Campanum, urbemque Capuam, agros, delubra Deum, divina humanaque omnia, in vestram P. C. ditionem dedimus*: et quidam populi, cum <sup>r</sup>Romanorum ditioni subicere se vellent, ne recepti quidem sunt; quod narrat Appianus: quid obstat quominus et uni homini præpotenti populus aliquis eundem ad modum dedere se possit? Apud Virgilium legitur:

Nec cum se sub leges pacis iniquæ  
Tradiderit regno.

Accidere etiam potest, ut paterfamilias latifundia possidens neminem alia lege in suas terras habitantem recipere velit: aut ut quis magnam servorum copiam habens eos manumittat, sub imperii ferendi et census pendendi legibus: quæ suis exemplis non carent. De servis Germanorum apud Tacitum est: *Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono, injungit, et servus hactenus paret.*

Germ. 25.

Polit. II.

4 Adde quod sicut Aristoteles dixit quosdam homines natura esse servos, id est, ad servitutem aptos; ita et populi quidam eo sunt ingenio, ut regi quam regere norint rectius; quod de se sensisse Cappadoces videntur, qui ob-

Strab. Justin.  
xii. Lib.  
xxxviii.

runt, ut protegerentur adversus Tantalios et exules. Thucyd. Lib. 1. c. 25.  
<sup>r</sup> Romanorum ditioni] Et Venetorum. Bembus, Lib. vi.

<sup>o</sup> Sub imperio plane regio satis feliciter vixerunt] Seneca de Beneficiis, libro II. c. xx. de Bruto locutus: *Mihi, cum vir magnus fuerit in aliis, in hac re videtur vehementer errasse, nec ex insti-*

*tutione Stoica se gessisse: qui aut regis nomen extimuit, cum optimus civitatis status sub rege justo sit, aut ibi speravit libertatem futuram, ubi tam magnum præmium erat, et imperandi et serviendi: aut existimavit civitatem in priorem formam posse revocari, amissis pristinis moribus: futuramque ibi æqualitatem civilis juris, et statutas suo loco leges, ubi*

other conditions: or if it be in want and cannot otherwise obtain sustenance. So the Campanians of old submitted themselves to the Romans, [see the text from Livy] and some peoples, which wished to do so, were not accepted. What then prevents a people from giving itself up to some powerful man in the same manner? Or again, it may happen that a large landowner will not allow persons to dwell on his land on any other condition: or if any one have a large body of slaves, he may manumit them on condition of being his subjects and paying his taxes. So the Germans did. [See the text from Tacitus.]

4 Add to this that, as Aristotle says that some men are slaves by nature, so some nations are more prone to be governed than to govern. So the Cappadocians, when the Romans offered them their liberty, refused it, and declared they could not live without a king.

latæ a Romanis libertati vitam sub rege prætulerunt, negantes vivere se sine rege posse. Sic Philostratus, vita Apollonii, Lib. vii. 3. stultum esse ait, Thracas, Mysos, Getas in libertatem vindicare, qua non gaudeant.

5 Neque vero non aliquos movere poterunt exempla gentium, quæ per sæcula plurima sub imperio plane regio satis feliciter vixerunt. Urbes sub Eumene, ait Livius, nullius Lib. xlii. 5. liberæ civitatis fortunam cum sua mutatam voluisse. Est et interdum is civitatis status, ut videatur nisi sub libero unius imperio salvus esse non posse; quod de Romana, qualis erat Cæsaris Augusti ætate, multis prudentibus visum est. His ergo similibusque de causis accidere non potest tantum, sed et solet, ut se homines subjiciant imperio alterius ac potestati, quod et Cicero notat Officiorum secundo. Cap. 6.

6 Jam vero bello justo, ut ante diximus, sicut acquiri potest dominium privatum, ita et dominium civile, sive jus regendi non aliunde pendens. Neque vero hæc tantum pro unius imperio, ubi id receptum est, conservando dicta censerī debent: nam idem jus eademque ratio est procerum, qui plebe exclusa civitatem regunt. Quid, quod nulla respublica adeo reperta est popularis, in qua non aliqui aut valde inopes aut

*viderat tot millia hominum pugnantia, non an servirent, sed utri.* Vide et Bizarum *Historia Genuensi*, Lib. xiv. p. 329.

<sup>1</sup> *Urbes sub Eumene*] Sic multos ex liberis Græciæ civitatibus in Salamina Cypri, quod Evagoræ regnum erat, venisse narrat Isocrates. (Pag. 199 B.)

<sup>2</sup> *Ut videatur nisi sub libero unius*

*imperio salvus esse non posse*] Dion apud Philostratum v. cap. xi: δάδια δὲ μὴ χειροῦθεις ἤδη Ῥωμαίων αὐταὶ αἱ τυραννίδες πεποικικύαι, χαλεπὴν ἐργάσονται τὴν μεταβολήν. *Metuo ne Romani longis dominatibus edomiti nullam jam ferre possint mutationem.* (Cap. 34.)

So it was said that it was absurd to give freedom to Thracians, Mysians, Getans, because they had no heart for it.

5 Also many may be moved by the examples of nations which have lived happily for many generations under the rule of kings; as the cities of Asia under Eumenes. And sometimes the condition of the State is such that it cannot be safe except under the rule of one; as many prudent men have thought was the case with the Roman State at the time of Augustus. On these and other accounts, it not only may, but does often happen, that many subject themselves to the rule and power of another.

6 Moreover civil authority, or the right of governing, may also be acquired by legitimate war. And all this applies to a government by a body of Nobles, as well as by a single Ruler: and no State was



externi, tum vero et fœminæ, et adolescenter a deliberationibus publicis arceantur ?

7 Jam vero et <sup>x</sup>populi quidam alios sub se populos habent, non minus addictos sibi quam si regibus parerent : unde illa interrogatio, *Estne populus Collatinus in sua potestate ?* et Campani cum se Romanis dedidissent, facti dicuntur alienæ potestatis : Acarnania ut et Amphilochia dicuntur fuisse juris Ætolorum : Peræa et Caunus ditionis Rhodiorum : Pydna a Philippo Olynthiis data. Et quæ sub Spartanis fuerant oppida, postquam eorum ditioni exempta sunt, Eleutherolaconum nomen acceperunt. Cotyora urbs dicitur fuisse Sinopensium apud Xenophontem. Nicea Italiæ adjudicata Massiliensibus apud Strabonem, et Insula Pithecusæ Neapolitania. Sic Calatiam oppidum colonis Capuensi, Caudium colonis Beneventanæ adjudicata cum territoriis suis apud Frontinum legimus. Otho provincis Bæticiæ Maurorum civitates dono dedit : quod apud Tacitum est. Quæ omnia convelli necesse est, si id re-

Liv. l. 36.

Liv. vii. 31.

Liv. xxvi. 24.  
Liv. xxxviii.  
3: xxxii. 33.  
Strab. xiv.  
p. 563.  
Diod. Sic.  
xvi. p. 514.Pausan.  
Lacœ. iii. 21.Esp. Cyrî,  
v. 5.  
Lib. iv. p. 184.  
Ib. v. p. 248.De Colonis,  
p. 323.

Hist. l. 78.

\* *Populi quidam alios sub se populos habent*] Sic Salamis insula Atheniensium juris jam inde a Philæo et Eurysace Ajacis filiis, ut Plutarchus (pag. 83) Solone nos docet. Hanc Salaminem Atheniensibus ademit Augustus, ut postea Cephaleniam Adrianus, teste Xiphilino (pag. 264 D). Aternus ab antiquo Chlorum, teste Herodoto Lib. i. (cap. 160), et Samii multa in continente oppida tenere, ut Strabo docet Lib. xiv. (pag. 630). Anactorium partim ad Corinthios, partim ad Corcyrenses pertine-

bat, ut Thucydides scribit libro i. (§ 55). In pace cum Ætolis apud Livium : *Oeneade cum urbe agroque, Acarnaniam sento.* (Lib. xxxviii. c. 11). Sex oppida Halicarnasso attributa per Alexandrum Magnum, memorat Plinius *Historia Naturalis*, Lib. v. c. 29. Idem libro xxxiii. c. iv, Lindum insulam esse ait Rhodiorum : tantundem de Cauno habes libro xxxv. c. 10. Testatur idem Cicero, (Lib. i. *Epist.* i. c. 11), epistola ad fratrem. Rhodiis fisdem, quod Romanos contra Antiochum juvissent,

ever so popular, that some were not excluded from public voting ; as strangers, paupers, women and children.

7 Some peoples have other peoples under them, not less subject than if they were under kings : and thus that interrogation, *Is the Collatine people its own master ?* And the Campanians, when they had given themselves up to the Romans, are spoken of as not being their own masters. Acarnania and Amphilochia are described subjects of the Etolians ; Peræa and Caunus, as dependencies of the Rhodians ; Pydna, as given by Philip to Olynthus. The towns which had been under the Spartans, after they were taken from their rule, had the name of Eleutherolacones, Free Laconians. Cotyora is spoken of by Xenophon as a city of the Sinopians. Nicea in Italy was adjudged to the Massilians, as we read in Strabo, and the island Pithe-

cipimus, jus regendi semper subditum esse eorum iudicio ac voluntati, qui reguntur.

8 At vero esse reges, qui populi etiam universim sumti arbitrio non subsint, tum sacra, tum profana historia testantur. *Si dixeris*, inquit Deus populum Israeliticum alloquens, *Statuam supra me regem*: et ad Samuelem: *Indica eis jus regis, qui regnaturus est super eos*. Hinc rex unotus dicitur super populum, super hereditatem Domini, super Israellem: Salomo rex super totum Israellem. Sic David Deo gratias agit, quod populum suum ipsi subjecerit. Et Christus: *Reges, inquit, gentium dominantur eis*. Notum illud Horatii: (Lib. III. Od. 1):

Regum timendorum in proprios greges,  
Reges in ipsos imperium est Jovis.

9 Tres gubernandi formas ita describit Seneca: *Interdum populus est quem timere debeamus: interdum, si ea civitatis disciplina est, ut plurima per senatum transigantur, gra-*

complures urbes dono datas ait Eutropius, libro iv. (cap. 2), nempe Carum et Lyciorum, quæ rursus eis ablata a Senatu. Utrumque est in Excerptis Polybii. [Cap. 36. Non unum est in hac Nota, ceteroquin supervacanea satia, ἀμάρτημα μνημονικόν. I. Salaminem Augustus non ademit Atheniensibus. Sub horum enim imperio illam fuisse etate sua testatur STRABO, pag. 394. Confudit Auctor Salaminem cum Ægina; de qua XIPHILINUS ait: Τὸς δὲ Ἀθηναίους ἐκδάκωσεν, Ἀγίνας ἀφελόμε-

νοι. Pag. 75 v. II. Hadrianus non ademit Cephalleniam iisdem Atheniensibus: quin potius dedit, ut patet ex Xiphilino, quem Auctor laudat: Τὴν τε Κεφαλληνίαν ἔλην τοῖς Ἀθηναίοις ἐχαρίσατο. III. Nulla est Insula Lindus: sed hæc est urbs Insulæ Rhodi, ut omnes sciunt. Quum in loco Plinii, xxxiii. 4. hæc verba legantur: *Minervæ templum habet Lindos, INSULÆ Rhodiorum, in quo Helena sacravit* etc. Auctor noster videtur, dum festinaret, legisse, INSULA Rhodiorum. J. B.]

causa to the Neapolitans. So in Frontinus we read that the town Calatia was adjudged to Capua, Caudium to the colony of Beneventum, with their territories. Otho gave the cities of the Mauri to the province of Bætica, as it is recorded in Tacitus. All which acts must be rejected, if we are to hold the doctrine that the right of governing is always subject to the judgment and will of those who are governed.

8 That there are Kings who are not subject to the will of the People, even taken in its totality, both sacred and profane history testify. The kings of Israel were appointed by God, and were said to be anointed over the people, over the Lord's inheritance over all Israel. [See the passages quoted O. T.: and also Horace.]

9 Seneca described three forms of government;—by the people, by a senate, or by a monarch: [and the latter is considered as absolute.]

*tiosi in ea timentur viri: interdum singuli quibus potestas populi et in populum data est.* Tales sunt quos Plutarchus ait, οὐ κατὰ τοὺς νόμους μόνον, ἀλλὰ καὶ τῶν νόμων ἄρχειν, imperium habere non ex legibus modo, sed et in leges: et apud Herodotum Otanes singulare imperium sic describit: ἀνευθύνως ποιέειν τὰ βούλεται· *facere quod quis velit, ita ut alii rationem non reddat.* Dioni quoque Prussæensi regnum definitur: ἐπιτάττειν ἀνευθύνων ὄντα, ita imperare, ut alii ratio non reddatur: Pausanias Messenicis opponit βασιλείαν ἀρχῇ ὑπευθύνῳ, regnum potestati tali quæ rationem actuum reddere debeat.

10 Aristoteles reges quosdam esse ait cum eo jure, quod alibi habet ipsa gens in se ac sua. Sic postquam Romani principes imperium vere regium usurpare cœperunt, dicitur populus in eos omne suum imperium et potestatem contulisse, etiam in se, ut interpretatur <sup>1</sup>Theophilus. Hinc illud dictum M. Antonini Philosophi: *Nemo nisi solus Deus judex principis esse potest.* Dion. Lib. liiii. de tali principe: αὐτοτελής ὄντως καὶ αὐτοκράτωρ, καὶ ἑαυτοῦ, καὶ τῶν νόμων, πάντα τε οἷα βούλοιο ποιῆ, καὶ πάντ' ὅσα ἂν μὴ βούλοιο μὴ πράττη: *Liber est, sui que ac legum potens, ut et quod vult, faciat, et quod non vult, non faciat.* Tale regnum jam antiquitus erat in Græcia regnum <sup>2</sup>Inachidarum Argis:

*Inst. de Jur. Nat. § sed et quod. l. 1. § 1. p. 171 d. M. Ant. p. 271 d. Pag. 591 A.*

<sup>1</sup> Non satis recta interpretatio. Vide omnino Clar. ΝΟΟΤΗ Observ. Lib. 1. cap. iii. ejusdemque egregiam Orationem *De Jure Summi Imperii, et Lege Regia*, quam et nos Gallice versam, Notulisque illustratam, altera vice edidimus, simul cum Oratione ΓΡΟΝΟΒΗ *De Lege Regia*, ann. 1714. J. B.

<sup>2</sup> *Inachidarum*] *Hi sunt τῆρα. Deut.*

ii. 10. ex qua origine et τῆρα ὄγκα dea, cui templum Thebis Cadmus dicavit. Græci eam Pallada dixerunt. Dicuntur Æschylo Inachidæ fuisse Pelasgi, id est, extorres a Syro 𐤆𐤋𐤁. Etiam qui Lacedæmonem primi tenuere, Pelasgi erant, unde Abrahamo se cognatos dicebant Lacedæmonii in historia Maccabaica. (Lib. 1. cap. 15, vers. 21). Sicut autem Argivi

So Plutarch speaks of those who have authority not only from the laws, but over the laws. Otanes in Herodotus speaks of irresponsible authority. So Dio Prussæensis and Pausanias oppose kingly power to responsible power.

10 Aristotle says that some kings have the power which, in other places, the nation has over itself. So when the Roman rulers had acquired a really royal power, the People is said to have transferred to them all its authority and power. Hence Antoninus said that *God alone is the judge of the Prince.* Dio says, of such a Prince, that *he is free to do and not to do what he pleases.* Such a power was that in

nam in Argiva Tragœdia *Supplicibus* sic populus regem affatur apud Æschylum : [v. 370.] Pag. 390.

Σὺ τοι πόλις, σὺ δὲ τὸ δῆμον,  
 Πρύτανις ἀκριτος ὄν,  
 Κρατύνεις βωμῶν ἑστίαν χθονός,  
 Μονοψήφοισι νείμασι σίθεν.

Tu res populi, tuque urbs tota es,  
 Non judiciis subditus ullis,  
 Regni solio fultus ut ara,  
 Unoque regens cuncta arbitrio.

11 Longe aliter quam de Atheniensium republica rex ipse Theseus apud Euripidem loquitur, (*Supplic.* ver. 404, et seqq.)

οὐ γὰρ ἄρχεται  
 Ἐπὸς πρὸς ἀνδρός, ἀλλ' ἐλευθέρα πόλις.  
 Δῆμος δ' ἀνάσσει διαδοχαῖσιν ἐν μέρει  
 Ἐνιαυσίαισιν.

Hæc juris sui  
 Parere domino civitas uni negat:  
 Rex ipse populus annuus mandat vices  
 Honoris huic, illive.

Nam Theseus, ut Plutarchus explicat, belli tantum ducem et legum custodem agebat, <sup>2</sup>cetera par civibus. Hinc factum, ut reges, qui populo subsunt, non nisi improprie reges appel-

*Vid. Theop.*  
 p. 11 A.

reges plenissima nisi potestate exemplo Orientis, unde venerant, sic et reges Thebani e Phœnicibus. Apparet id ex Creontis verbis apud Sophoclem, (*Antigon.* vers. 516, et seqq. 681, 682) et fecialis Thebani *Supplicibus* Euripidis : [vers. 410, 411. Vide etiam Pausan. in *Boeotic.* c. 5. Verum Reges Argivi non ita plena utebantur potestate; ut patet

vel ex loco Pausaniæ, quem Auctor ipse adfert paulo post, *num. seq.* Vid. et Notam Gronovii ad Æschylî verba. *J. B.*]  
<sup>2</sup> *Cetera par civibus*] Thesei filius Demophon in *Heraclidis* Euripidis; (vers. 424, 425):

Οὐ γὰρ τυραννὶς ὥστε βαρβάρων ἔχω,  
 Ἄλλ' ἦν δίκαια δρῶ, δίκαια πείσομαι.  
 Nec enim potestas barbarum in morem mihi,  
 Sed justa refero obsequia, dum juste impero.

ancient Greece of the Inachidæ at Argos. [See the Chorus in the *Supplices* of Æschylus.]

11 Very different was the power of the kings at Athens, as Theseus speaks in the *Supplices* of Euripides. [See the passage.] For Theseus, as Plutarch explains, was only a Leader in war, and Guardian of the laws, being in other respects on a level with the citizens. Hence kings who are subject to the people are only improperly called kings. So after Lycurgus, the kings of the Lacedæmonians are said to be kings in name, not in reality, by Polybius, Plutarch, and Cornelius Nepos. And this example was followed in other parts of Greece, as at Argos. [See

lari dicantur. Sic post Lycurgum, magisque post Ephoros constitutos, reges Lacedæmoniorum reges nomine, non re fuisse dicuntur Polybio, Plutarcho, <sup>2</sup>Cornelio Nepoti. Quod exemplum secuti et alii in Græcia. Pausanias Corinthiacis: Ἀργεῖοι δὲ ἄτε ἰσηγορίαν καὶ τὸ αὐτόνομον ἀγαπῶντες ἐκ παλαιοτάτου, τὰ τῆς ἔξουσίας τῶν βασιλέων εἰς ἐλάχιστον προσήγαγον, ὡς μηδενὶ τῶν Κείσου καὶ τοῖς ἀπογόνοις ἢ τὸ ὄνομα λειφθῆναι τῆς βασιλείας μόνον: *Argivi jam olim æqualitatis et libertatis amantes regiam potestatem in minimum redegerunt, ita ut Cisi filiis ac posteris præter nomen regni nihil relinquerent.* Sic et apud Cumæos de regibus judicasse senatum notat Plutarchus. Talia regna negat Aristoteles constituere propriam speciem gubernationis, quia scilicet partem tantum faciunt in republica optimatum aut populi.

12 Quin et in populis qui perpetuo regibus non subsunt exempla videmus <sup>a</sup>quasi temporarii regni, quod populo non subsit. Talis erat potestas Amymonum <sup>3</sup>apud Cnidios, et apud Romanos Dictatorum primis temporibus, cum ad populum provocatio non esset; unde Dictatoris edictum pro numine observatum ait Livius, neque usquam ullum nisi in cura parendi auxilium: Dictatura obsessam vim regiæ potestatis Cicero.

13 Quæ pro contraria sententia adferuntur argumenta,

<sup>2</sup> *Cornelio Nepoti*] Verba Ipius, aut quisquis is est, qui vitas illustres scripsit, in *Agesilao*: (cap. 1). *Ut duos haberent reges nomine magis quam imperio.* Alibi: *Lacedæmoniorum autem Agesilau nomine, non potestate fuit rex, sicut*

*ceteri Spartani.* (cap. 21. *De Regib.*)

<sup>a</sup> *Quasi temporarii regni*] Livius *Salinator* in Censura omnes tribus, excepta una, ærarias fecit, ac sic ostendit jus sibi esse in populum omnem. [Lib. **xxix.** cap. 37].

the passage from Pausanias.] And so the senate judged of the kings at Cuma, as Plutarch notes. Aristotle denies that such kingly government is a peculiar form of government, since it is only a part in an aristocratical or democratical constitution.

12 Sometimes we find, in peoples not generally governed by kings, examples of a temporary kingly authority, not subject to the people. Such was the authority of the Amymones among the Cnidians, and of the Dictators in the early times of Rome, when there was no appeal to the People: whence Livy says that the edict of the Dictator was obeyed as a divine law, there being no choice but to obey. And Cicero speaks of the Dictature as controlling the regal power.

13 The arguments on the other side [that all kings are responsible to the people] are not difficult to answer: for

Lib. vi. c. 8.  
Vit. Cleom.  
p. 805.

Cap. 19.

Quæst. Gr.  
p. 291.  
Pol. III. 16.

Plutarch. de  
Marcell. p.  
312. et Dion.  
Halic. v. 70.  
Lib. II. 18.

Philop. I. 1.  
I.

ea solvere difficile non est. Nam primum, quod asseverant eum a quo aliquis constituitur esse superiorem constituto, verum dumtaxat est in ea constitutione, cujus effectus perpetuo pendet a voluntate constituentis; non etiam in ea, quæ ab initio est voluntatis, postea vero effectum habet necessitatis: quomodo mulier virum sibi constituit, cui parere semper necesse habet. <sup>b</sup>Valentinianus Imperator militibus, qui se Imperatorem fecerant, postulantiibus quod ipsi non probabatur respondit: *Ut me ad imperandum vobis eligeretis, in vestra situm erat potestate, o milites: at postquam me elegistis, quod petitis, in meo est arbitrio, non vestro. Vobis tanquam subditis competit parere, mihi, quæ facienda sunt, cogitare.* Sed nec verum est quod assumitur, omnes reges a populo constitui: quod exemplis patrisfamilias advenas sub obediendi lege acceptantis, et gentium bello devictarum, quæ supra attulimus, satis intelligi potest.

Rosom. Hist.  
Ecc. vl. 6.

14 Alterum argumentum sumunt ex dicto Philosophorum, regimen omne eorum qui reguntur, non qui regunt, causa esse comparatum: unde sequi existimant, ex finis nobilitate, eos qui reguntur, superiores esse eo, qui regit. Sed nec illud universaliter verum est, omne regimen ejus qui regitur causa esse comparatum; nam quædam regimina per se sunt regentis causa, ut dominicum; nam servi utilitas ibi extrinseca est et

II.

<sup>a</sup> Exemplum male aptatum: patet enim ex verbis Plutarchi, a Gronovio excerptis, Amnemonas illos non habuisse imperium solummodo temporarium, sed perpetuum, *διὰ βίου*. Hunc quoque errorem a Bodino hausit, qui vel memo-

ria lapsus, vel festinans, apud Plutarchum legerat, *δι' ἔτους*. J. B.

<sup>b</sup> *Valentinianus*] Verba ejus sic refert Theodoretus IV. c. vi: *ὑμέτερον ἦν ᾧ στρατιῶται, βασιλείῳ μὴ ὄντος, ἐμοὶ δοῦνας τῆς βασιλείας τὰς ἡμέρας*.

(1) First, the assertion that he who constitutes any authority is superior to the person so constituted, is only true in that constitution which depends perpetually on the will of the constituent body: not in that which, though voluntary at first, afterwards becomes compulsory: thus a woman constitutes a person her husband, whom afterwards she is obliged for ever to obey. And in this strain is the speech of Valentinian to his soldiers. [See the passage.]

Nor is it true, as is assumed, that all kings are constituted by the people; which we have already shewn by the example of a landowner accepting tenants on condition of their obeying him; and of nations conquered in war.

14 (2) The other argument is taken from the maxim of the philosophers, that all government exists for the sake of the governed, not

adventitia: sicut medici lucrum ad ipsam medicinam non pertinet. Sunt alia regimina mutæ utilitatis causa, ut maritale. Sic imperia quædam esse possunt comparata ad regum utilitatem, ut quæ victoria parta sunt, et non ideo tyrannica dicenda sunt, cum tyrannis, ut quidem ea vox nunc intelligitur, injustitiam includat. Possunt et quædam utilitatem respicere tam ejus qui regit, quam ejus qui regitur, ut cum populus impotens sibi tuendo regem potentem imponit. Ceterum non nego in plerisque imperiis respici per se utilitatem eorum qui reguntur: et verum esse quod Cicero post Herodotum, Herodotus post Hesiodum dixit, fruendæ justitiæ causa reges constitutos. Sed non ideo consequens est, quod illi inferunt, populos rege esse superiores: nam et tutela pupilli causa reperta est, et tamen tutela jus est ac potestas in pupillum. Nec est quod instet aliquis, tutorem, si male rem pupillarem administret, amoveri posse; quare et in rege idem jus esse debere. Nam in tutore hoc procedit, qui superiorem habet; at in imperiis, quia progressus in infinitum non datur, omnino in aliqua aut persona, aut cœtu consistendum est, quorum

De Offic. 11. 12.  
Lib. I. 96, 97.  
Theopon. ver.  
83 et seqq.

ἐπει δὲ ταύτην ἐδεξάμην ἐγώ, ἐμὸν  
λοιπὸν οὐχ ὑμέτερον, τὸ περὶ τῶν κοι-  
νῶν διασκοπεῖσθαι πραγμάτων. Ve-  
strum fuit, milites, cum imperator nullus  
esset, mihi tradere Imperii hujus habe-  
nas. Eas, ex quo adeptus sum, de cetero  
non vestrum sed meum dispicere quid  
reipublicæ expediat.

c Deum de principibus judicare] Xi-  
phlinus: (in Marc. Anton. p. 271 D.  
Ed. H. Steph.) πρὸ γὰρ τοι τῆς ἀντρα-  
χίας ὁ Θεὸς μόνος κρίνει δύναιται. De  
summo principatu Deus solus potest ju-  
dicare. Vitigis rex apud Cassiodorum:  
Causa regis potestatis supernis est ap-  
plicanda iudiciis, quandoquidem illa e

of the governors; whence they conceive it follows that, the end being more noble than the means, the governed are superior to the governors.

But it is not universally true that all government is for the sake of the governed: for some kinds of government are for the sake of the governor, as that of the master in his family; for there the advantage of the servant is extrinsic and adventitious; as the gain of the physician is extrinsic to the art of medicine. Other kinds of government are for the sake of common utility, as the marital. So some kingly governments may be established for the good of the kings, as those which are won by victory: and these are not therefore to be called tyrannies; since *tyranny*, as we now understand it, implies injustice. Some governments too may have respect to the utility both of the governor and the governed; as when a people in distress places a powerful king over it to defend it.

But I do not deny that in most governments, the good of the

peccata, quia superiorem se judicem non habent, Deus sibi *Jer. xxv.*  
 curæ peculiari esse testatur; qui ea aut vindicat, si ita opus  
 judicet, aut tolerat in pœnam aut explorationem populi.

15 Optime Tacitus: *Quomodo sterilitatem, aut nimios* *Hist. iv.*  
*imbres, et cetera naturæ mala, ita luxum vel avaritiam*  
*dominantium tolerate. Vitia erunt donec homines, sed neque*  
*hæc continua, et meliorum interventu pensantur.* Et M.  
 Aurelius magistratus dixit de privatis, principes de magistra-  
 tabus, <sup>c</sup>Deum de principibus judicare. Insignis est apud Gre-  
 gorium Turonensem locus, ubi is ipse Episcopus Regem Fran-  
 corum sic affatur: *Si quis de nobis, o Rex, justitiæ tramites*  
*transcendere voluerit, a te corripitur potest: si vero tu exces-*  
*seris, quis te corripiet? Loquimur enim tibi, sed si volu-*  
*eris, audis: si autem nolueris, quis te damnabit, nisi is,*  
*qui se pronuntiavit esse justitiam?* Inter Essenorum pla-  
 cita Porphyrius memorat οὐ δὶχα Θεοῦ περιγίνεσθαι τισὶ  
 τὸ ἀρχεῖν, non obtingere cuiquam imperium <sup>a</sup>sine Dei cura  
*speciali.* Irenæus optime: *Cujus jussu homines nascuntur,*  
*hujus jussu et reges constituuntur apti iis, qui in illis tem-*

*Hist. v.*  
 [Vide Co-  
 de Boulay  
 villers, H  
 vetust. r<sup>o</sup>  
 Franc. I.  
 52 sqq.]

*De Abrin*  
 p. 389. [c  
 Joseph. I  
 Jud. II. 8  
 7.]  
 Lib. v. 24

*calo petita est, et soli celo debet inno-*  
*centiam.* Apud eundem Cassiodorum  
 rex: *Alteri subdi non possumus, quia*  
*judices non habemus.* [Primus locus  
 CASSIODORI exstat *Var. x. 31.* sed ibi  
 leguntur tantum priora verba, non autem  
 illa, *quandoquidem etc.* Alter est in  
*Formula præfecturæ Urbana vi. 4.*

J. B.]

<sup>a</sup> *Sine Dei cura speciali*] Homerus,  
 [*Iliad.* Lib. I. vers. 197]:

Τῆμ' ὃ' ἐκ Διὸς ἔσσι.  
 Ab Jove summus honos.

Diodorus Siculus, Lib. I. *de Ægyptiis*:  
 (pag. 57, *Ed. Steph.*) ἀμα μὲν οὐκ ἀνευ  
 δαιμονίου τινὸς προνοίας νομιζόντες αὐ-

governed is the object; and that, as Hesiod, Herodotus and Cicero say, kings are constituted for the sake of justice. But it does not follow, as our opponents infer, that peoples are superior to kings: for guardianship is for the sake of the ward, and yet the guardian has authority over the ward. And we are not to allow them to urge that if a guardian neglects his duty to his ward, he may be superseded; and that therefore kings may be so. For this is the case with a guardian, because he has a superior, (the State); but in political government, because we cannot have an infinite gradation of superiors, we must stop at some person or body, whose transgressions, having no superior judge, are the province of God; as he himself declares. And he punishes them, if he deem fit to do so; or tolerates them, in order to punish or to try the people.

15 So Tacitus says that the vices of Princes are to be tolerated like bad seasons; and may alternate with better. And M. Aurelius said that the magistrates judge private men; Princes, the magistrates;



Lib. vii. 16.

*poribus ab ipsis regnantur.* Sensus idem in constitutionibus, quæ dicuntur Clementis: τὸν βασιλέα φοβηθήσῃ, εἰδὼς ὅτι τοῦ κυρίου ἐστὶν ἡ χειροτονία, *regem timebis, gnarus a Domino electum.*

1 Reg. xiv. 16.  
2 Reg. xvii. 7.

16 Nec obstat his quæ diximus, quod populi interdum puniti leguntur ob regum peccata: non enim id eo evenit, quod populus regem aut non puniret, aut non reprimeret, sed quod vitiiis ejus tacite saltem consentiret. Quanquam etiam sine eo Deus summo dominio, quod in vitam necemque singulorum habet, uti potuit in pœnam regis, cujus supplicium est subditis orbari.

IX. 1 Sunt alii qui mutuum quandam subjectionem sibi fingunt, ut populus universus regi recte imperanti parere debeat, rex autem male imperans populo subjiciatur: qui si hoc dicerent, non facienda ob regis imperium ea, quæ manifeste iniqua sunt, verum dicerent, et quod apud omnes bonos confessum est: sed id nullam includit coercionem, aut jus aliquod imperii. Quod si etiam populo alicui propositum fuisset par-

τοὺς τετευχένει τῆς τῶν ἄλλων ἐξουσίας: *Existimant enim non sine divina quadam providentia pervenisse reges ad summam de omnibus potestatem.* Augus-

tinus, Lib. v. *de Civitate Dei*, (cap 21): *Qui Vespasiano vel patri vel filio, suavissimis imperatoribus, ipse et Domitiano crudelissimo, et ne per singulos ira*

God, Princes. In Gregory of Tours is a passage to the same effect. So the Essenes hold, in Porphyry: Irenæus, and the Clementine Constitutions. [See the text.]

16 Nor is it an objection to this, that peoples are described as being punished for the faults of kings: for that does not happen because the people did not punish the king or control him, but because it consented, at least tacitly, to his transgressions\*. Although indeed, God might punish the King by his supreme power without the help of the people.

IX. 1 Some assert that there is a mutual subjection, so that the whole people ought to obey the king when he rules rightly, but when a king rules ill, he is subject to the people. If these reasoners were to say that those things which are manifestly iniquitous are not to be done, though commanded by the king, they would say what is true, and confessed by all good men: but this [resistance or disobedience] does not include any authority, or right of control.

If any people intended to share the power of government with the

\* I suppose the opponent would ask, how the people could shew that it did not tacitly consent to the king's transgressions, otherwise than by controlling or punishing him. W. W.

tiri cum rege imperium (qua de re infra dicendum erit aliquid) fines certe potestati utriusque assignari debuissent tales, qui cognosci facile possent ex locorum, personarum, aut negotiorum discrimine.

2 Bonitas autem aut malitia actus, præsertim in civilibus, quæ sæpe obscuram habent disceptationem, apta non sunt ad partes distinguendas: unde summam confusionem sequi necesse est, cognitionem de re eadem pro jure potestatis, obtentu actus boni malive, hinc ad se rege trahente, inde populo: qualem rerum perturbationem introducere nulli, quod sciam, populo in mentem venit.

X. 1 Sublatis opinionibus falsis, restat cautiones adhibeamus aliquas, quæ viam nobis monstrare possint ad recte dijudicandum, cui jus summæ potestatis in gente quaque competat. Prima cautio hæc sit, ne decipiamur ambiguo nominis sono, aut rerum externarum specie. Exempli causa, quantum apud Latinos opponi solent principatus et regnum, ut cum Vercingetorigis patrem dicit Cæsar principatum obtinuisse

*De Bell. Gall.*  
vii. 4.

*necesse sit, qui Constantino, ipse apostate Juliano, nempe majestatem dedit, quod præcesserat. Vitigis apud Cassiodorum, (Var. x. 31): Omnis proventus,*

*maxime regius, ad divinitatis munera referendus est. Titi Imperatoris erat dictum: potestates fato dari. [Aur. Victor. Epitom. c. 10].*

king, (on which point we shall have something to say hereafter,) such limits ought to be assigned to the power on each side as might easily be recognized by distinctions of places, persons, and matters.

2 But the goodness and badness of an act, [the allegation that the king rules well or ill,] which are often matters of great doubt, especially in political affairs, are not fit marks to make such distinctions. Whence the most extreme confusion must follow, if the king and the people claim cognisance of the same matter by the allegation of good and evil conduct. Such a disturbed state of things no people, so far as I know, ever thought of introducing.

X. 1 Having thus removed the opinions which are false, it remains that we lay down some cautions, which may shew us how to judge rightly in whom the Sovereign authority in each nation resides.

The first caution is this: that we are not to be deceived by ambiguous names or mere external appearances. For example, in the Latin there is a customary opposition of Governor (*Princeps*,) and King; as where Cæsar says that the father of Vinctorex acquired the government of Gaul, but was put to death because he aimed at the kingly power; and where Piso, in Tacitus, says that Germanicus was the son of a Roman governor, not of a Parthian king; and where

*Ann.* xi. 57. apud Tacitum, Germanicum dicit principis Romanorum, non Parthorum regis esse filium: et cum Suetonius parum abfuisse ait Caligulam, quin speciem principatus in regnum converteret: et cum Velleio Maroboduus dicitur non principatum parentium voluntate constantem, sed vim regiam complexus animo.

*Calig.* 22. *Lib.* ii. 106. 2 Videmus tamen confundi hæc sæpe: nam et Lacedæmonii duces ex Herculis posteritate, postquam Ephoris subiecti fuere, reges dicebantur nihilominus, ut modo vidimus: et veteri Germaniæ reges erant, quos Tacitus præfuisse ait auctoritate suadendi, non potestate jubendi: Et de Evandro rege Livius, rexisse eum auctoritate magis quam imperio: et Suffetem Carthaginensium Aristoteles et Polybius βασιλέα appellant: ut et Diodorus, quomodo et Hannonem \*Carthaginensium regem dixit Solinus. Et de Scepsi in Troade narrat Strabo, cum, adjunctis in civitatem Milesiis, populari republica uti cœpisset, veterum regum posteris nomen mansisse regium, et honoris nonnihil.

*Germ.* 11.

*Lib.* i. 7.

*Polit.* xi. 9.  
*Hist.* vi. 49.  
*Biblioth.* xv.  
p. 465.  
*Cap.* 66.

*Geogr.* xiii.  
p. 607.

3 Contra Romani Imperatores, postquam palam et sine ulla dissimulatione regnum liberrimum tenuerunt, principes ta-

\* *Carthaginensium regem dixit Solinus* [Sic qui vitam scripsit Annibalis: *Ut enim Roma consules, sic Carthagine quotannis annui bini reges creabantur.*

(Corn. Nepos, c. 7). His improprie dictis regibus accenseri possunt et filii, quibus regium nomen datum a patribus regiam vim retinentibus. Talis is Darius

Suetonius says that Caligula was within a little of converting the office of a Governor into a royal estate; and where in Velleius, Maroboduus is said to have imagined to himself, not a government constituted by the choice of subjects, but royal authority.

2 Yet we often find these two names confounded: for the Lacedæmonian governors of the posterity of Hercules, after they were subjected to the Ephori, were called nevertheless Kings, as we have seen. And in ancient Germany there were Kings whom Tacitus asserts to have held their authority by force of persuasion, not of command: and Livy says that King Evander governed more by personal might than by legal office; and Aristotle and Polybius call the Suffete of the Carthaginians, King; as also Diodorus; so likewise Solinus calls Hanno King of the Carthaginians: and Strabo says of Scepsis in the Troad, when, joining the Milesians, they formed a republic, that the posterity of the old Kings retained the royal name and something of the royal honour.

3 On the other hand, the Roman emperors, when they had acquired unquestioned and unconcealed absolute powers, continued to

men vocabantur. Sed et insignia regiæ majestatis in liberis quibusdam civitatibus tribui principibus solent.

4 Jam vero comitia ordinum, <sup>4</sup>id est, conventus eorum, qui populum in classes distributum referunt, nimirum, ut Guntherus loquitur,

*Liger. viii.  
ver. 577.*

Prælati, proceres, missisque potentibus urbes :

alibi quidem in hoc serviunt duntaxat, ut sint majus regis consilium, per quod querelæ populi, quæ sæpe in consistorio retinentur, ad regis aures perveniant; cui deinde liberum sit statuere, quod ex usu ipsi videatur: alibi etiam jus habent de actis principis cognoscendi, atque etiam leges præscribendi, quibus princeps teneatur.

5 Sunt multi, qui existimant discrimen summi imperii, aut summo minoris, petendum ex delatione imperii per electionem aut successionem. Nam quæ hoc modo deferuntur imperia, ea summa esse contendunt, non item quæ illo. At hæc universim vera non esse pro certo haberi debet. Nam successio non est titulus imperii, qui imperio formam assignet, sed veteris continuatio. Jus enim ab electione familiæ cœptum succedendo continuatur; quare quantum prima electio tribuit, tantum defert successio. Apud Lacones regnum ad heredes

fuit, quem pater Artaxerxes judicatum interfici jussit. Plutarchus in *Artaxerxe* (pag. 1026).

<sup>4</sup> Vide PUFENDORF. *De Jur. Nat. et Gent. Lib. VII. cap. vi. § 12. J. B.*

be called *Principes*, not Kings.

Also the ensigns of royal power are assigned to the governor in some cities which are free; [as to the Doge at Venice. *Gronovius.*]

4 The Estates of the Realm, or assemblies which represent the various classes of the community, "Prelates, Nobles, and Burgesses," are sometimes only a Great Council of the King, serving to make him acquainted with the complaints of the people, which are often not urged in the Privy Council; and to enable him to decide what is best on such subjects. But in other places these Estates have the right of taking cognisance of the acts of the Prince, and even of prescribing laws by which he is bound.

5 Many think that the distinction of Sovereignty and subordinate authority is to be found in the difference of succession and election: what comes by succession they hold to be sovereign; not what comes by election. But this is certainly not universally true. For succession is not a charter which determines the force of authority, but a continuation of authority already existing. The authority bestowed by the

transibat, etiam post Ephoros constitutos. Et de tali regno, id est, principatu, est apud Aristotelem: *τούτων τῶν βασιλειῶν αἱ μὲν κατὰ γένος εἰσὶν, αἱ δὲ αἰρεταί, quædam sanguinis jure, quædam electione deferuntur*: et Heroicis temporibus <sup>f</sup>pleraque in Græcia regna talia fuisse et ipse notat et Thucydides. Contra Romanum imperium, etiam sublata omni senatus et populi potestate, per electionem conferebatur.

Pol. III. 14.

Lib. I. § 13.

XI. 1 Altera cautio hæc esto. <sup>g</sup>Aliud esse de re quæ-  
rere, aliud de modo habendi, quod non in corporalibus tantum, sed et in incorporalibus procedit. Ut enim res est ager, ita et iter, actus, via. Sed hæc alii habent jure pleno proprietatis, alii jure usufructuario, alii jure temporario: ita summum imperium dictator Romanus habebat <sup>h</sup>jure temporario: reges <sup>g</sup>plerique, tam qui primi eliguntur, quam qui electis legitimo ordine succedunt, jure usufructuario: at quidam reges pleno jure proprietatis, ut qui justo bello imperium quæsierunt, <sup>g</sup>aut in quorum ditionem populus aliquis, majoris mali vitandi causa, ita se dedit, ut nihil exciperetur.

<sup>f</sup> Pleraque in Græcia regna talia fuisse] Notatum id et Dionysio Halicarnassensi Libro II. (cap. 12), et Lib. V. (cap. 74).

<sup>g</sup> Aliud de re querere, aliud de modo habendi] Videat cui vacat Carolus Molineæ ad consuetudines Parisienses, Tit. I. § 2, gl. 4. num. 16 et 17.

<sup>h</sup> Jure temporario] Imperatoris ad tempus facti exemplum habes apud Gregoram Libri IV. initio. (Pag. 36.

Ed. Colon. Allobr. 1618).

<sup>g</sup> Posui plerique, pro denique, quod in omnibus est Edd. Res ipsa postulat hanc emendationem; et oppositio τῶν quidam reges, in sequenti membro. Sic Auctor infra, § 14. PLERAQUE imperia summa non plene habeantur. Et alibi: Reges, quales nunc sunt PLERIQUE, regnum habentes non in patrimonio, sed tamquam in usufructu etc. Lib. III. cap. 20, § 5. Mirum, ab Auctore tale men-

election of the family is continued by succession: whatever amount of right the first election gives, the succession transmits the same. So the Lacedæmonian kings, though not absolute, were hereditary. The distinction is noted by Aristotle and Thucydides. On the other hand, the Roman empire was absolute, yet elective.

XI. 1 A second caution is this. We must distinguish between what a thing is, and what is the kind of possession of it. A thing is, for example, a piece of land; also, in this sense, a road, an act, a right of way. Now such a thing may be held *pleno jure*, in full right of property; or *jure usufructuario*, as tenant for life; or *jure temporario*, as tenant for a time only. Thus the Roman Dictator held his authority as temporary tenant; most kings, both elected and hereditary, by usufructuary right; but some kings, in full right of property; as those who have acquired their power in a legitimate war, or in whose power any people has put itself absolutely, for some sufficient motive.

2 Neque enim illis assentio, qui dictatori negant fuisse summum imperium, quia perpetuum non erat. Nam rerum moralium natura ex operationibus cognoscitur: quare quæ facultates eisdem effectus habent, eodem nomine nuncupandæ sunt. At Dictator intra tempus suum <sup>1</sup>omnes actus eodem jure exercet, quo rex qui est optimo jure; neque ejus actus ab alio reddi irritus potest. Duratio autem naturam rei non immutat: quanquam si de dignitate quæritur, quæ majestas dici solet, dubium non est, quin ea major sit in eo, cui jus perpetuum datum est, quam cui temporarium; quia ad dignitatem facit habendi modus. Atque idem dictum volo de his, qui antequam reges ad suam tutelam pervenerint, aut dum furore, aut captivitate impediuntur, curatores regni ita constituuntur, ut populo non subsint, neque ante legitimum tempus potestas eorum sit revocabilis.

3 Aliud censendum de his, qui jus acceperunt quovis tempore revocabile, id est precarium, quale olim Vandalorum regnum fuit in Africa, et <sup>k</sup>Gothorum in Hispania, <sup>l</sup>cum ipsos

*Procopius*  
*Vand. l. 9.*  
*Attoin. li. 90.*  
*iv. 35.*

dum typhothetarum, vel forte exscriptoris, non fuisse animadversum. *J. B.*

<sup>6</sup> Gratis statuitur heic, necessitatem illam per se efficere ut regnum sit in patrimonio Victoris, aut se dedentes accipientis. Re vera nullum omnino Regnum est in patrimonio, nisi ex consensu, expresso vel tacito, Populi. Quæ de re diximus in Notis nostris Gallicis ad hunc locum. *J. B.*

<sup>l</sup> *Omnes actus eodem jure exercet]*

Adeo quidem ut populus, cum Fabium Rullianum servare vellet, apud dictatorem precibus egerit. [Narrat Livius, Lib. viii. cap. 29-35].

<sup>k</sup> *Gothorum regnum in Hispania]* Moris antiqui vestigium in Behetris. Vide Marianam, Lib. xvi. (cap. 17).

<sup>l</sup> *Cum ipsos deponerent populi quoties displicerent]* Hoc de Herulis etiam prodidit Procopius Gothicorum ii. (cap. 14, 15) *de Longobardis* Paulus War-

2 The Dictator was Sovereign, though temporary. For the nature of moral things [such as power] is known from their operations, and those faculties or powers which have the same effect must be called by the same name. Now the Dictator, during his office, performed all the acts which the most absolute king can perform; nor could his acts be rendered void by any one. And the duration of a thing does not alter its nature. If indeed you ask concerning the dignity, the *majesty* of the office, undoubtedly it is greater in a perpetual office. In the same manner those Regents are Sovereigns for the time, who govern during the nonage, insanity, or captivity of the king, and whose power is not revocable before a certain legitimate period.

3 The case is different with governors whose authority may be revoked at any time; as the kings of the Goths and the Vandals. These are not sovereign.

deponerent populi quoties displicerent; horum enim singuli actus irriti possunt reddi ab his, qui potestatem revocabiliter dederunt; ac proinde non idem est effectus, nec jus idem.

XII. 1 Quod autem dixi, quædam imperia esse in pleno jure proprietatis, id est, in patrimonio imperantis, quidam viri eruditi hoc argumento oppugnant, quod liberi homines in commercio non sint. At sicut alia est potestas dominica, alia regia; ita et alia est libertas personalis, alia civilis, alia singulorum, alia universorum. Nam et Stoici quandam servitatem constare dicebant *ὑποτάξει*, in subjectione: et in sacris literis subjecti regis servi vocantur. Sicut ergo libertas personalis dominium excludit, ita libertas civilis regnum atque aliam quamvis proprie dictam ditionem. Livius ista opponit: *Regem vocabant, libertatis dulcedine nondum experta*. Idem: *Indignum videbatur, populum Romanum servientem, cum sub regibus esset, nullo bello nec ab hostibus ullis obsessum esse; liberum eundem populum ab Hetruscis obsideri*. Et alibi: *Non in regno populum Romanum, sed in libertate esse*. Rursum alio loco <sup>m</sup>opponit gentes, quæ in libertate essent, iis, quæ sub regibus viverent. Cicero dixerat: *Aut evigendi reges non fuerant, aut plebi re, non verbis danda libertas*. Post hos Tacitus: *Urbem Romam ab initio reges habuere: libertatem et consulatum L. Brutus instituit*. Et

*Holom. cont.*  
iii. q. 1.

*Diog. Laërt.*

*1 Sam. xxii.*  
*17; 2 Sam.*  
*x. 2; 1 Reg.*  
*ix. 22.*  
*Liv. l. 17.*

*Lib. ii. 12.*

*Lib. ii. 15.*

*Lib. xiv. 18.*

*Lib. iii. De*  
*Legibus, 10.*

*Ann. l. 1.*

nafredi Libro iv. et vi. *de Burgundis* Ammianus, Libro xxviii. (cap. 5. *Ed. Vales. Gron.*) *de Moldavis* Laonicus Chalcocondylas: *de rege Agadis apud Afros* Johannes Leo Libro vii. (pag. 651. *Ed. Elzevir.*) *de Norwagis* ait Guilielmus Neubrigensis regem ibi factum, quisquis regem occidisset: de Quadis et Jazygibus similia habes in excerptis Dionis. [e Theodosio, in *Vit. Marci*

*Antonini.*]

<sup>m</sup> *Opponit gentes, quæ in libertate essent, iis, quæ sub regibus viverent*] Thucydides: [Lib. ii. §. 29.] ὁ δὲ Τήρης οὗτος ὁ τοῦ Σιτάλκου πατήρ πρῶτος Ὀδρύσαις τὴν μεγάλην βασιλείαν ἐπὶ πλέον τῆς ἄλλης Θράκης ἐποίησε· πολλὸν γὰρ μέρος καὶ αὐτόνομόν ἐστι Θρακῶν. *Hic Teres Sitalcis pater primus Odrysarum regnum ita*

## XII. [There are monarchies *pleno jure*.]

1 Some oppose this, because, they say, men are not things, and cannot be possessed *pleno jure*, as things. But personal liberty is one thing, civil liberty, another. Men may have personal liberty, so as not to be slaves; and yet not have civil liberty, so as to be free citizens. *Libertas* and *regnum* are constantly opposed in the Roman writers. [See the passages.] The question is not concerning the liberty of individuals, but of a people: and a people which is not thus free, is said to be *non sui juris, non suæ potestatis*. [See the passages.]

alibi: *Acrior Arsacis regno Germanorum libertas.* Arrianus *De Moribus Germ.* Indicis: Βασιλεῦσι καὶ τῆσι πόλεσιν ὅσαι αὐτόνομοι. *Regibus et civitatibus liberis.* Cæcina apud Senecam: *Regalia fulmina sunt quorum vi tangitur vel comitium, vel principalia urbis liberæ loca; <sup>n</sup> quorum significatio regnum civitati minatur.* Sic Cilicum illi, qui regibus non parebant, Eleutherocilices nuncupati. De Amiso Strabo, modo liberam fuisse, modo sub regibus. Et passim in legibus Romanis de bello, et de judiciis recuperatoriis, externi distinguuntur in reges et populos liberos. Hic ergo non de hominum singulorum, sed de populi libertate quæritur. Quin et sicut ob privatam, ita ob hanc publicam subjectionem, aliqui dicuntur esse non sui juris, non suæ potestatis. Hinc illa: *Quæ urbes, qui agri, qui homines Ætolorum juris aliquando fuerunt: Et, Estne populus Collatinus in sua potestate?*

2 Proprie tamen cum populus alienatur, non ipsi homines alienantur, sed jus perpetuum eos regendi, qua populus sunt. Sic cum uni liberorum patroni libertus assignatur, non hominis liberi fit alienatio, sed jus quod in hominem competit transcribitur.

3 Neque illud magis firmum est, quod aiunt; si quos populos rex bello quæsierit, cum eos non sine civium sanguine ac sudore quæsierit, civibus quæsitos potius credi debere quam

*auxilii, ut ceteros Thraciæ reges superaret: est enim pars etiam Thracum libera.* Seneca pater suasoria prima: *Non eodem modo in libera civitate dicendam esse sententiam, quo apud reges.* Josephus *Antiquæ Historiæ*, Libro xiiii. πρὸς βασιλεῖς καὶ δημοὺς ἐλευθέρους. (Cap. ix. § 2). *Ad reges populosque liberos.* Cicero, *Epistolarum* xv. 4. Populorum liberorum, regumque so-

ciorum auxilia. Plinius Libro vi. cap. xx. *de Indis: Jam hi montium, qui perpetuo tractu Oceani oram tenent, liberi et regum expertes.* [Oceani oræ præteriti legitur in Edit. Hard. § 23, pag. 321, Tom. 1. Ed. in fol.]

<sup>n</sup> *Quorum significatio regnum civitati minatur* Vide exemplum talis ostentii apud Bizarum libro xix. *Historiæ Genuensis.*

2 When a people is transferred from one Sovereign to another, it is properly, not the persons, but the right of governing them, which is transferred; as a freedman (*libertus*) may be assigned by his patron to one of his sons.

3 Again, they object that if the king has conquered another nation [and so made them his, *pleno jure*,] he has won them by the dangers and labours of his citizens, and therefore the acquisition is theirs. But this will not hold. For the king may have supported the army out of his own property or patrimony. For though he has only the usufruct

*De Moribus Germ.*  
Cap. 11.

*Not. Quæst.*  
ii. 49.

*Cic. Ep. ad Famil.* xv. 4;  
*ad Attic.* v. 21.  
*Lib. xii. p.*  
547.

*Liv. xxxviii.*  
11.

*Idem, l. 38.*



regi. <sup>7</sup>Nam et fieri potuit, ut rex <sup>o</sup>ex sua privata substantia exercitum aluerit, aut etiam <sup>p</sup>ex fructibus ejus patrimonii quod principatum sequitur. Nam ut in ipsum illud patrimonium rex aliquis non nisi usumfructum habeat, perinde ut in ipsum jus imperandi populo, qui se elegit, fructus tamen ipsius sunt proprii; sicut in jure civili est proditum, hereditatis quæ restitui jussa est fructus non restitui, quia non hereditati accepto feruntur, sed rei. Evenire ergo potest, ut rex <sup>q</sup>in quosdam populos imperium habeat proprio jure; ita ut alienare etiam possit. Strabo Cytheram insulam Tænaro objacentem fuisse ait Eurycelis Lacedæmoniorum principis *ἐν μέρει κτήσεως ἰδίας, privato ipsius jure*. Sic rex Solomo regi Phœnicum Hieromo (ita enim eum Græce vocat Philo Byblius, qui Sanchuniatonis historiam vertit) dedit urbes viginti: non ex urbibus populi Hebræi: nam Cabul (quod nomen illis urbibus datum est) ponitur extra fines Hebræorum, Jos. xix. 27, sed ex iis urbibus, quas populi devicti hostes Hebræorum ad eum diem retinuerant, quasque partim rex Ægypti Solomonis socer vicerat, et Solomoni dotales dederat, partim subegerat

Lib. xviii. in  
fidel Commis-  
saria. § Quo-  
tiens 2. D.  
ad SC. Tre-  
bellian.

Lib. viii. p.  
363.

1 Reg. ix. 11,  
12.

<sup>7</sup> Neque objectio, neque responsio Auctoris, satisfaciunt ad probandum, quod uterque intendit. Inde enim tantum sequitur, regnum, de quo agitur, Civibus potius quam Regi, aut Regi potius quam Civibus, quæsitum fuisse: quo autem jure, ususfructus an patrimonii, alia est questio, de qua monuimus supra, ad § 11, num. 1. *J. B.*

<sup>o</sup> *Ex sua privata substantia*] M. Antoninus ad bellum Marcomanicum cum ærario exhausto indicare populo nihil vellet, facta in foro Trajani auctione, distraxit vasa aurea, pocula crystallina ac murrina, uxoris et suam sericam et auream vestem, multa ornamenta gemmarum. [Vide CAPITOLIN. *Vit. Anton. Philos.* cap. 17. EUTROPIUM, Lib. viii. cap. 6. AUR. VICTOR. *Epit.* cap. 16. *J. B.*]

<sup>p</sup> *Ex fructibus ejus patrimonii*] Ideo Ferdinandus Granatensis regni partem alteram, ut stante matrimonio ex Castellæ proventibus quæsitam, sibi vindicavit. Docet Mariana Lib. xxviii. *Historia Hispanica*.

<sup>q</sup> *In quosdam populos imperium habeat proprio jure*] Balduino concessere, qui cum ipso in orientem belli causa venerant, ut urbium, provinciarum, vectigalium, rerum bello captarum dimidium ipsi cederet.

<sup>r</sup> *Hercules*] Idem Hercules Dryopes, qui juxta Parnassum habitabant, a se victos donavit Apollini. Servius ad iv. *Æneidos* (vers. 146). Herculeum adversus Lapithas belli socium sibi sumsit Ægimius Doriensium rex, parte regni in mercedem societatis data. (*Apollod.* ii. 7. 7). Cychreus Salaminis rex prole

of his patrimony, he may do what he likes with that. So in the Civil Law, when a property is adjudged from a tenant to the heir, the yearly fruit is not refunded, because that belongs not to the heir, but to the property.

A king then may have authority over a people *proprio jure*, so that

ipse Solomo. Nam eo tempore ab Israelitis non habitatas argumento est, quod postquam Hieromus eas reddidit, tum <sup>2</sup> Par. viii. 2. demum Solomo eo deduxit Hebræorum colonias.

4 Sic <sup>1</sup> Hercules legitur Spartæ bello captæ imperium Tyndareo dedisse hac lege, ut si quos ipse Hercules liberos relinqueret, iis restitueretur. Amphipolis in dotem data Acamanti <sup>2</sup> Thesei filio. Et apud Homerum Agamemnon septem urbes se Achilli daturum pollicetur. <sup>3</sup> Melampodi partes regni duas dono dedit rex Anaxagoras. De Dario sic Justinus: *Regnum Artaxerxi, Cyro civitates, quarum præfectus erat, testamento legavit.* Sic <sup>4</sup> Alexandri successores in jus illud plenum ac proprietatem imperandi populis, qui sub Persis fuerant, pro sua quisque parte successisse, aut etiam ipsi victoriæ jure id imperium sibi quæsisisse censendi sunt: quare non est mirandum, si alienandi jus sibi arrogarunt.

5 Sic cum <sup>5</sup> Attalus rex Eumenis filius populum Romanum testamento bonorum suorum heredem fecisset, populus Romanus sub bonorum nomine etiam regnum complexus est. Florus de ea re: *Adita igitur hereditate provinciam*

carens regnum testamento reliquit Teucro. [Immo Telamoni. Idem, III. II. 7.] Peleus ab Eurytione Phthiæ rege tertiam regni partem accepit in dotem (III. 12. 1.) quæ habet Apollodorus: apud Livium est Lib. 1: *Proca Numitorii regnum legat.* (Cap. 3.)

<sup>6</sup> Habet hoc Auctor ex DEMOSTHENE, in Orations *De male obita Legatione*: *Ὅν [Θησίως παίδων] Ἀκάμας λέγεται φερρὴν ἐπὶ τῇ γυναικὶ λαβεῖν τὴν χώραν ταύτην [Ἀμφιπόλει] pag. 251, A. Ed. Bas. J. B.*

<sup>7</sup> *Melampodi*] Vide Servium ad sextam *Eclogam*: [vers. 48. et Pausan. Corinth. c. 18] sic apud Homerum Iobates Bellerophonti dat filiam: *Δῶκε δὲ εἰ τιμῆς βασιλῆϊδος ἤμισον πύσης.* Quod Servius sic interpretatur (*Iliad.* VI. 193), ad Virgilium (*Æn.* v. 118)

*Asiam suam ei cum parte regni in matrimonium dedit.* Phoenix de Peleo (*Iliad.* IX. 479):

πολλὴν δέ μοι ὤπασε λαόν  
Ναῖον δ' ἰσχυρὴν Φθίης, Δολόπουσιν ἀνδρῶσιν  
Populos dedit hic mihi multos,  
Ut fines Phthiæ, Dolopum quæ regna, tenerem.  
Lanassa nubens Pyrrho Epirotarum regi in dotem ei attulit Coreyram urbem, ab Agathocle patre suo bello captam. Plutarchus Pyrrho, (Pag. 387).

<sup>8</sup> *Alexandri successores*] Ammianus *de Perside*, non exacte tamen ad historis fidem: *Ex testamento nationem omnem in successoris unius jura translata.* libro XXIII. (cap. VI. pag. 398. *Ed. Vales. Gronov.*)

<sup>9</sup> *Attalus rex*] Valerius Maximus: *Attalus testamenti æquitate gratis Asiam populo Romano legavit.* Lib. V. cap. II.

he can even alienate the kingdom to another. This has even been done: as by Solomon to Hiram (or Hierom) king of Tyre.

4 And often in Grecian history. [See the examples.]

5 And in Roman history. Attalus left his kingdom, Asia, to the Romans by will: so did Nicomedes, Bithynia; so did Appion, Cyrenaica.

*populus Romanus, non quidem bello nec armis, sed, quod est æquius, testamenti jure retinebat.* Et postea cum <sup>2</sup>Nicomedes Bithyniæ rex moriens populum Romanum fecisset heredem, regnum in provinciæ formam redactum est. Cicero secunda in Rullum: *Hereditatem crevimus, regnum Bithyniæ.* Sic Libyæ pars <sup>3</sup>Cyrenaica eidem populo ab Appione rege testamento relicta.

Cap. 15.

Cap. 18. vide et Epit. Liv. 43.

Orat. II. 16.

Just. xxxviii. 6.

6 Tacitus Annalium xiv. agrorum meminit, qui regis <sup>2</sup>Apionis quondam habiti, et populo Romano cum regno relictis. Cicero de lege Agraria: *Quis ignorat, regnum Ægypti, testamento regis Alexandrini, populi Romani esse factum?* Mithridates in oratione apud Justinum de Paphlagonia loquens: *Quæ non vi, non armis, sed adoptione*

Extern. 3.) Sertorius ea de re apud Plutarchum: τῷ δικαιοτάτῳ τρόπῳ Ῥωμαίων κεκτημένον ἑπαρχίαν. *Cum populus Romanus optimo jure eam terram teneret.* (Pag. 580, E. Tom. 1. Ed. Wech.)

<sup>2</sup> *Nicomedes*] Vide Appianum Mithridatico et civili primo. (Pag. 218, et 420).

<sup>3</sup> *Cyrenaica*] In qua urbes Berenice, Ptolemais, Cyrene. Eutropius vi. (Cap. 9).

<sup>2</sup> *Apionis*] Appianus Mithridatico: (in *fn.*) Κυρήνην αὐτὴν Ἀπίων βασιλεὺς τοῦ Λαγνηῶν γένους νόθος ἐν διαθήκαις ἀπέλιπεν: *Cyrenen testamento reliquit Apion nothus e Lagidarum genere.* Ammianus, Lib. xxii. (cap. 16); *Aridiorem Libyam supremo Apionis regis consecuti sumus arbitrio: Cyrenas cum residuis civitatibus Libyæ Pentapoleos Ptolomæi liberalitate suscepimus.* Rex enim Cyrenarum et Apio, et Ptolemæus dicebatur: vide breviarum Livii Lib. lxx. Ipse hic Apio Cyrenarum hoc regnum patris testamento acceperat, auctore Justino Lib. xxxix. (c. 5). Alterius Apionis, cuius Ammianus meminit, qui aridam Libyam populo Romano reliquerit, mentio in chronico Eusebiano

ad annum cIo Io cccclii. Adde quod in ædificiis narrat Procopius, (Lib. iii. c. 1), Arsacis regis testamento ita divisam Armeniam, ut major pars Arsaci, minor Tigrani cederet. Ex Josepho discimus, Herodem, Augustus ei concedente ut regnum cui e liberis vellet relinqueret, testamentum aliquoties mutasse, *Antiquæ Historiæ*, Lib. xv. et xvi. Mos hic etiam Gothis et Vandalis in iis, quæ armorum jure tenebant. Gizerichus Vandalus de Hispania testamentum fecit. Procopius Vandalicorum i. (cap. 7). Theudericus Lilybeum in Sicilia dotem dat sorori Amalæfridæ. Procopius ibidem. Sed et aliis gentibus. Aquitaniam bello quesitam Pipinus inter liberos divisit: Fredegarius sine Chronici. De Burgundia testamento relicta vide Aimoinum iii. 68 et 75. Fessæ rex Fessam secundo filio legat. Leo Afer libro iii. quem et *de Bugia* vido libro quinto. (pag. 531). Sultanus Aladinus Osmani plurimas legavit civitates. Leunclavius *Turcicæ Historiæ* libro ii. Germeanoglius rex cum filia sua, Bajazeti nuptura, dedit Phrygiæ urbes. Idem Leunclavius libro v. *Regnum Turcorum in Cappadocia* Musal [vel Masut] in liberos distribuit. Nicetas libro iii.

### 6 [Other examples.]

XIII. 1 Some sovereignties are not held *pleno jure*: namely, those which are bestowed by the will of the people. In this case, the king is not to be presumed to have the right of alienation. So Crantzius

*testamenti patri suo obvenisset.* Narrat idem ab Orode Parthorum rege diu dubitatum, quem filiorum suorum post se regem destinaret. Et Polemo Tibarenorum adsitæque regionis dynasta uxorem reliquit imperii heredem: quod et in Caria olim fecerat Mausolus fratres habens superstites.

Lib. xlii. 4.

Strabo, xii. p. 656.

Idem, xiv. p. 656.

XIII. 1 At in regnis, quæ populi voluntate delata sunt, concedo non esse præsumendum eam fuisse populi voluntatem, ut alienatio imperii sui Regi permitteretur. Quare quod Crantzius ut rem novam notat in Unguino, quod is Norvagiam testamento reliquisset, non est quod improbemus, si Germanorum mores respicit, apud quos regna eo jure minime habebantur. Nam quod Carolus Magnus, et Ludovicus Pius, et alii postea etiam apud Vandalos et Hungaros

Lib. ii. Dan. 4.

(cap. 6.) Urbes ad Pontum Euxinum a Chuscino Bega Murati traditæ. Leucivius libro 1. Bajazetes Stephano urbes dedit Servis in honorem uxoris suæ, quæ Stephani soror. Idem Lib. vi. Mahumetes Sultanus Murati testamento regnum reliquit. Idem libro xii. Jacupus Begus Germeanoglius ditionis suæ heredem fecit Muratem Sultanum. Idem libro xiv. Mahumetes Turca filiis duobus, Amurati Europæ, Mustafæ Asiæ imperium relinquere cogitavit: est id apud Chalcocondylam Lib. iv. Basilius Porphyrogenetus Imperator a Davide Cypripalate heros institutus ejus regionis, quam David ille in Iberia tenuerat. Narrat Zonaras. (Lib. xvii. cap. 7). Venio ad Christianos in Oriente victores. Thessaliam Michael Despota inter liberos divisit. Habet id Gregoras Lib. iv. (pag. 52. *Ed. Genev.* 1616). Ætoliæ Princeps Venetis Athenas reliquit, Bœotiam Antonio vendidit. Chalcocondylas libro iv. Messena, Ithomæ, et Arcadiæ maritima ab Arcadiæ principe filiæ data in dotem, cum ea Thomæ Imperatoris Græci filio nuberet. Idem libro v. Acarnania inter nothos Caroli principis testamento ipsius divisa: partes de Ætolia cognatis datæ: narrante eo quem dixi

Chalcocondylia. Sic et regna Hierosolymorum et Cypri partim testamentis legata, partim transcripta contractibus: vide de Cypro Bembus Italicorum vii. et Parutum libro primo. Genuatibus in Sardinia Castrum oppidum donatum, alia Calaritanæ ditionis, donata. Bizarus de Bello Pisano libro ii. Robertus filio minori Boëmundo dedit Dyrrachium et Aulonem. Anna Comnena Lib. v. (cap. 2.) Alfonsus Arragonius Neapoleos regnum, ut armis partum, Ferdinando notho suo reliquit. [Mariana, *Hist. Hisp.* Lib. xxii. cap. 18.] In eodem regno urbes quasdam Ferdinandus legavit nepoti. Mariana libro xxx. (Cap. 27. *seu ultimo.*)

\* Non esse præsumendum eam fuisse populi voluntatem, ut alienatio imperii sui regi permitteretur] Imperium non debere relinqui ut agros et servos dicit Vespicius Tacito. (Cap. 6). Salvianus: Non poterat populos, quos regebat, per testamentum egenis tradere. [Locus exstat Lib. 1. *Adversus Avaritiam*, cap. 12. *Edit. Baluz.* sed qui forte non admodum adpositus est. *J. B.*]

¶ Vide *Vitam Caroli Magni* ab EGINHARTO scriptam, cap. 30. ibique Notas nuperæ Editionis. *J. B.*

notes, as a thing without precedent, Unguin giving Norway by testament. The bequests of kingdoms by Charlemagne, Louis, and others, were to be taken rather as a commendation than an alienation: and

L. b. xl. 56.

de regnis testati leguntur, <sup>b</sup>id commendationis magis vim apud populum habebat, quam versæ alienationis. Atque id de Carolo speciatim Ado memorat, voluisse eum testamentum suum a Francorum optimatibus confirmari. Simile est quod apud Livium legimus, Regem Macedonum Philippum, cum Persea a regno arcere, et ejus loco regem facere vellet Antigonom, fratris sui filium, obiisse Macedoniæ urbes, <sup>c</sup>ut principibus Antigonom commendaret.

2 Nec quod idem ille Ludovicus urbem Romam Paschali Pontifici reddidisse <sup>1</sup>legitur, ad rem facit, cum Franci imperium in urbem Romam a populo Romano acceptum, reddere <sup>2</sup>eidem populo recte potuerint: cujus populi quasi personam sustinebat is, qui primi ordinis princeps erat.

XIV. Quod autem huc usque monuimus, distinguendam esse summitatem imperii ab habendi plenitudine, adeo verum est, ut non modo pleraque imperia summa non plene habeantur, sed et multa non summa habeantur plene: quo fit ut <sup>d</sup>marchionatus et comitatus facilius quam regna vendi et testamento relinqui soleant.

<sup>b</sup> *Id commendationis magis vim apud populum habebat*] Vide Capitulum XII. conventus ad Carisiacum sub Carolo Calvo. Huc refer testamentum Pelagii, quo Hispaniam reliquit Alfonso et Ormisinda, [apud Marianam, *Rer. Hisp.* Lib. VII. cap. 3] et de Dania quædam apud Saxonem. Neque mirum igitur, quædam testamenta improbante populo fuisse irrita, ut Alfonsi Arragonii. Vide Marianam libro X. (cap. 15, 16.) Et Alfonsi Legionensis, cum is filias filio prætulisset. Idem Mariana libro XII. (Cap. 15).

<sup>c</sup> *Ut principibus Antigonom com-*

*mendaret*] Vide rem similem apud Casiodorum Lib. VIII. epist. III. et sequentibus. Ita pacta successionis mutue inter Sanctium et Jacobum Arragonenses a proceribus firmata. Mariana libro XII. (cap. 16) et Henrici Navarræ regis [testamentum, quo] Johannam instituit heredem. Idem Mariana libro XIII. (cap. 22) et Isabellæ reginæ Castellæ. Idem libro XXVIII. (cap. 11, 12.)

<sup>1</sup> Præter ea, quæ bene observavit Gronovius, non potest dici Ludovicus Pius reddidisse, quod numquam Pontifices Romani habuerant, jure scilicet imperii summi, de quo agitur. Diximus

accordingly Charlemagne desired to have his testament confirmed by the Frankish nobles. So Philip, king of Macedon, commended his nephew as king to the cities of Macedonia.

2 Louis restoring the city of Rome to Pope Paschal is not to the point; for the Franks might properly restore to the Roman people that authority over the city of Rome which they had received from the Roman people; and the Pope might be considered as representing the people.

XIV. Some powers lower than sovereignty are held *pleno jure*: as marquises, counties, baronies, are sold, bequeathed, or otherwise alienated, much more commonly than kingdoms.

XV. 1 Est et alterum hujus discriminis indicium <sup>e</sup>in regni tutela, dum rex ætate aut morbo fungi potestate sua impeditur. Nam in regnis, quæ non sunt patrimonialia, tutela eorum est, quibus lex publica, aut ea deficiente <sup>f</sup>consensus populi eam mandat. <sup>g</sup>In regnis patrimonialibus eorum, quos pater aut propinqui elegerint. Sic videmus in Epirotarum regno, quod consensu populi ortum fuerat, Arribæ regi pupillo publice tutores constitutos: et a proceribus Macedonum Alexandri Magni posthumo. At in Asia minore bello parta rex Eumenes Attalo filio fratrem suum tutorem dedit. Sic filio Hieronymo pater Hiero in Sicilia regnans quos voluit testamento tutores assignavit.

Just. xvii. 3.

Just. xlii. 2.  
Plut. de  
Amore Frat.  
Tom. II. pp.  
489, 490.  
Liv. xxiv. 4.

2 Sive vero rex simul sit privato jure fundorum dominus, ut rex Ægypti post Josephi tempus, et Indorum reges, memorante Diodoro, ac Strabone, seu non sit, hoc imperio extrinsecum est, nec ad ejus naturam pertinet. Quare nec imperii speciem aliam, neque alium habendi imperii modum hoc quidem constituit.

Lib. II. 40.  
Lib. xv. p.  
704.

XVI. 1 Tertia observatio sit, non desinere summum esse

in Notis Gallicis. Vide HERMANNI CONRINGII Librum *De Germanorum Imperio Romano*, cap. vi. et seqq. *J. B.*

<sup>2</sup> Sed posito, quod falsissimum, veram esse illam, sive donationem, sive restitutionem, nil refert a quo Franci imperium acceperint in urbem Romam, aut cui postea tradiderint: hoc tantum queritur, an Ludovicus arbitrio suo, aut non sine consensu Populi, id fecerit. *J. B.*

<sup>4</sup> *Marchionatus et comitatus facilius quam regna vendi*] Vide de *Urgetiæ Principatu* Marianam Lib. xii. cap. 16.

<sup>6</sup> *In regni tutela*] Vide Cothmannum

tomo I. conf. xli. num. 11.

<sup>f</sup> *Consensus populi*] Vide Marianam (viii. 10) in Alfonso V. Legionis rege. At testamentum regis Johannis de tutela et administratione regni a proceribus improbatum. Mariana libro xviii. (Cap. 16).

<sup>g</sup> Discrimen istud non satis firmo in universum fundamento nititur, ut ostendimus in Notis nostris Gallicis ad hunc locum. *J. B.*

<sup>g</sup> *Quos pater aut propinqui elegerint*] Ptolomæus rex Ægypti tutorem filio suo reliquit populum Romanum. Valerius Maximus libro vi. cap. vi. 1.

XV. 1 The distinction between patrimonial and non-patrimonial kingdoms is seen in the mode of appointing a Regent or Guardian, when the king, from age or disease, cannot act. In non-patrimonial kingdoms this is done by public law, or that failing, by consent of the people: in patrimonial kingdoms, by the father, or the family. Thus in Epirus, the Regents were appointed by the consent of the people: in the kingdom of Asia, by the will or testament of the sovereign.

2 Whether the king be, in addition, the owner of the land, as the king of Egypt after Joseph, and the kings of the Indian nations, makes no difference in this matter.

XVI. [Sovereignty is not destroyed by grants of rights from the

imperium, etiam si is qui imperaturus est <sup>h</sup>promittit aliqua subditis aut Deo, etiam talia quæ ad imperii rationem pertineant. <sup>4</sup>Nec jam de observatione juris naturalis et divini, adde gentium, loquor, ad quam reges omnes tenentur, etiamsi nihil promiserint, sed de regulis quibusdam, ad quas sine promisso non tenerentur. Verum esse quod dico ex similitudine patrisfamilias apparet, qui si quid familiæ facturum se promiserit, quod ad familiæ gubernationem pertineat, non eo desinet in sua familia jus summum, quantum fert familia, habere. Nec maritus maritali potestate privatur, eo quod aliquid uxori promiserit.

2 Fatendum tamen, id ubi fit, arctius quodammodo reddi imperium, sive obligatio duntaxat cadat in exercitium actus, <sup>5</sup>sive etiam directe in ipsam facultatem. Priore specie actus contra promissum factus erit injustus, quia, ut alibi ostendemus, vera promissio jus dat ei, cui promittitur: <sup>6</sup>altera autem specie erit etiam nullus defectu facultatis. Neque inde

<sup>h</sup> *Promittit aliqua subditis aut Deo*] Trajanus caput suum, domum suam, si scienter fefellisset, deorum iræ consecrabat. Plinius *Panegyrico*, (cap. 64). Adrianus Imperator juravit, nunquam se senatorem, nisi ex Senatus sententia, puniturum. [Spartian. *Vit. ejus*, c. 7.] Anastasius Imperator juravit, servaturum se decreta Chalcedonensis Concilii. Meminere Zonaras, (Lib. xiv. cap. 3). Cedrenus, alii. Seriores Imperatores Græci Ecclesiæ jurabant. Vide eundem Zonaram Michaelæ Rangabe (Lib.

xv. c. 22) et alibi. Vide et in Gothis regibus exemplum apud Cassiodorum x. 16, 17.

<sup>4</sup> Vide PUFENDORF. *De Jur. Nat. et Gent.* Lib. vii. cap. vi. § 10, et seqq. J. B.

<sup>5</sup> Obligatio cadit in exercitium actus, quando, e. g. Rex jus habet tributa aut vectigalia exigendi, sed ad certum quemdam modum tantum, aut in certo genere rerum. Ipsa autem *facultas* directe minuitur, quando Rex pro imperio nullum potest tributum aut vectigal exi-

Sovereign.]

1 The third observation is, that the authority does not cease to be sovereign, although the Ruler makes certain promises to his subjects, or to God, even of matters relating to the government. I do not now speak of promises to observe Natural Law and Divine Law, or the *Jus gentium*, to which all kings are bound, even without promise; but of the concession of rules to which they could not be bound without promise. The truth of this appears from the analogy of the master of a family, who, though he should have promised to do something which pertains to the government of the family, does not thereby cease to have the supreme power in the family, so far as family matters are concerned. Nor does a husband lose his marital power, by making certain promises to his wife.

2 But still it must be confessed, that when this is done, the sove-

tamen sequitur, ita promittente superiorem dari aliquem; nullus enim is actus non redditur hoc casu ex vi superiore, sed ipso jure.

3 Apud Persas rex summo cum imperio erat, *αὐτοκράτης καὶ ἀννκεύθυνος*, ut de eo Plutarchus loquitur, et ut imago Dei adorabatur: et ut apud Justinum est, non mutabatur nisi morte. Rex erat qui dicebat proceribus Persarum: *Ne viderer meo tantummodo usus consilio, vos contraxi: ceterum mementote, parendum vobis magis esse quam suadendum.* Tamen et jurabat cum regnum adiret, quod Xenophonti et Diodoro Siculo <sup>7</sup>notatum, et leges certa quadam forma latas <sup>1</sup>mutare illi nefas erat, ut et Danielis historia et Plutarchus in Themistocle nos docent, Diodorus quoque Siculus libro XVII. et multo post tempore Procopius Persici belli libro primo, ubi insignis ad hanc rem <sup>k</sup>historia exstat. Idem de Æthi-  
opum regibus tradit Diodorus Siculus. Eodem tradente, Ægyptiorum reges, quos tamen, ut alios reges Orientis, sum-

De Tyr. i.  
Resump.  
886 n.  
Idem, in  
mistocl. p.  
Lib. x. l.  
Val. Max  
5. art. n.

Cyrop. vi

Lib. vi. s  
16.  
Imm. in  
Arinar. p.  
1094, 1095  
Cap. 34, l.  
590.

Lib. III. l.  
102. c. 5.  
Lib. l. p.  
c. 70. et.

gere, sine consensu Populi. *J. B.*

<sup>6</sup> Immo utroque casu facultas agendi æque deficit, ac proinde actus per se æque nullus est. Non video, quo fundamento nitatur distinctio Auctoris. *J. B.*

<sup>7</sup> Nescio, ubinam juramenti illius meminerit Diodorus. Neque ad inveniendum juvat heic BAISSONIUS, *De Regio Persarum Principatu*: nam de re ipsa nihil omnino habet, ut nec de eo, quod sequitur. *J. B.*

<sup>1</sup> *Mutare illi nefas erat*] Josephus in *Historia Vastha*, καταλλαγήναι τῇ

Οὐδιστὴ διὰ τὸν νόμον οὐκ ἠδύνατο. (*Antiq. Jud. Lib. xi. c. 6. § 2. Edit. Huds.*) Cum *Vastha* conciliari lege intercedente non poterat. Tales leges vocabantur leges regni, ut notat Jacchiades ad Danielelem xi. 13. De legibus regnorum in Hispania vide Marianam libro xx. (cap. 3.)

<sup>k</sup> *Historia exstat*] Tamen idem de Lethe castello legem a rege mutatam refert, sed non probat. [*Ibid.* cap. 6. In 5: autem insignis historia legitur, quam Auctor indicat.]

reignty is in some degree limited, whether the obligations respect the exercise of certain acts, or directly affect the power. In the first case, an act done against the promise becomes unjust, because, as we shall elsewhere shew, a legitimate promise gives a Right to the promisee: in the second case, the promise is null by reason of defect of the power of making it. But it does not follow from this that the person so promising has a superior; for the promise is null, in this case, not by the act of superior power, but by Natural Law.

3 Thus the Persian king was absolute and irresponsible; yet he took an oath on his accession, and could not change laws duly made. [See the examples.] So the kings of the Ethiopians. So the kings of the Egyptians, who were absolute, were obliged to many observances: if they violated these, they could not be accused in their lifetime; but after their death they were accused, and buried with certain solemn-



mo imperio usos non est dubium, ad multarum rerum observationem obligabantur: verum si contra fecissent, accusari vivi non poterant, sed <sup>1</sup>mortuorum accusabatur memoria, et damnatis adjudicabatur solennis sepultura: sicut et <sup>m</sup>Hebræorum regum, qui male regnassent, cadavera extra proprium regibus locum sepulta, 2 Par. xxiv. 25, xxviii. 27, egregio temperamento, quo et sanctimonia summæ potestatis maneret, et tamen futuri iudicii metu reges a fide mutanda retraherentur. Epiri quoque reges jurare solitos, regnatos se juxta leges, ex <sup>n</sup>Plutarcho in Pyrrhi vita dicimus.

4 Quid si addatur, si rex fidem fallat, °ut tum regno cadat? ne sic quidem imperium desinet esse summum, sed erit habendi modus imminutus per conditionem, et imperium temporario non absimile. De Sabæorum rege narrabat Agatharchides fuisse *ἀνυπεύθυνον* liberrima potestate præditum,

*Apud Phot. Cod. 250, p. 1374, et pp. 63, 64, in Vol. I. Geograph. Minor. Hædæ.*

<sup>1</sup> *Mortuorum accusabatur memoria*] *ἀταφα γὰρ οἱ νόμοι τὰ σώματα τῶν τυράννων ὑπερορίζουσι· leges tyrannorum corpora insepulta extra fines projici jubent.* Appianus civillium tertio. (pag. 537.) Andronicus Imperator patrem suum Michaellem, quod fidem Latinam sequi cœpisset, mortuum sepultura privavit. Gregoras Lib. vi. sub init. pag. 75. *Edit. Genæv.*

<sup>m</sup> *Hebræorum regum*] Vide Josephum *de Joramis duobus*, altero Hierosolymorum, altero Israelis rege, Lib. ix. cap. v. § 3. et cap. vi. § 3. item *de Joaso Hierosolymorum rege.* (Ib. cap. viii. § 4.)

<sup>n</sup> *Plutarcho*] Verba sunt: *εὐθείσσαν*

*οἱ βασιλεῖς ἐν Κασσαρῶν χώρα τῆν Μολόττιδος ἀρείην Διὶ θέσαντες ὀρκωμοτεῖν τοῖς Ἑπειρώταις, καὶ ὀρκίζευν αὐτοὶ μὲν ἀρξέειν κατὰ νόμον, ἐκείνους δὲ τῆν βασιλείαν διαφυλάξαι κατὰ τοὺς νόμους. Solebant reges in Cassarorum terra, qua Molottidos pars est, Jovi Areo sacrificare, ac juramentum præstare Epirotis. Jurabant autem reges se imperaturos secundum leges. Epirotæ autem se imperium ejusdem conservaturos secundum easdem leges.* [Locus exstat pag. 885, c. Tom. i. *Ed. Weck.* Sed ibi recte legitur, ἐν Πασσαρῶνι χωρίῳ etc. non Κασσαρῶν χώρα, ut scripsit Auctor.]

ties. So those Hebrew kings who had reigned ill were buried in places out of the Royal burial-ground. 2 Chron. xxiv. 25; xxviii. 27. And this was an excellent institution, preserving the sacredness of the kingly power, and yet restraining kings from violating their faith by the fear of a futuro judgment. So the kings of Epirus swore to reign according to the Laws.

4 But suppose the condition to be added, that if the king violate his promise he should lose his kingdom? Even so, his sovereignty does not cease; it becomes a mode of possessing the kingdom, narrowed by the condition, and not unlike to a temporary sovereignty. So the king of the Sabæans, as Agatharchides related, was completely absolute, but if he quitted his palace, was liable to be stoned.

5 So an estate which we enjoy by a trustee is ours no less than if it were possessed in full property; but it ceases to be ours when the

sed si regia exiret potuisse lapidari: quod et Artemidoro auctore Strabo annotavit.

5 Sic fundus, qui fideicommisso tenetur, est quidem fundus <sup>o</sup> noster non minus quam si pleno dominio possideretur, sed habetur amissibiliter. Talis autem lex commissoria non tantum in regni delatione adjici potest, sed et in aliis contractibus. Nam et fœdera quædam cum vicinis videmus cum <sup>p</sup>tali sanctione inita.

Lib. xvi p.  
773.

XVII. 1 Quarto notandum, quamquam summum imperium unum quiddam sit ac per se indivisum, constans ex illis partibus, quas supra enumeravimus, addita summitate, id est, τῆ ἀνυρεθύνη, <sup>q</sup> fieri tamen interdum ut dividatur, sive per partes, quas vocant potentiales, sive per partes subjectivas. <sup>o</sup> Sic cum unum esset Romanum imperium, factum tamen sæpe est, ut alius orientem, alius occidentem teneret, aut ut tres

<sup>o</sup> *Ut iam regno cadas*] Vide exemplum apud Crantsium libro IX. Suedicorum.

<sup>p</sup> *Addidi vocem noster, quæ in omnibus Edd. excidit, propter similitudinem sequentis non, a typographis prætermissa. Res ipsa illam postulat: quid enim hoc est, Fundus, qui fideicommisso tenetur, est fundus? Est quoque Fundus, ubi Colono traditus est. Agitur omnino heic de re, quæ nostra est, quamquam non possideatur pleno dominio et irrevocabili. Fallor, an Auctor in mente habuit quod ait Paulus, l. 66. De rei vindicat. Non ideo minus recte quid nostrum esse vindicabimus,*

quod ABIRE A NOBIS DOMINIUM speratur, si conditio legati aut libertatis extiterit. Hæc plane gemina. J. B.

<sup>p</sup> *Tali sanctione*] Aut etiam ne subditi regem pacta violentem juvent; aut ne ei pareant: vide Cromerum *Polonicis* XIX. et XXI. Est et exemplum apud Schafnaburgensem in rebus Henrici anno CIDLXXIV. (pag. 499. *Edit. Argentor.* 1609).

<sup>q</sup> *Fieri tamen interdum ut dividatur*] Vide Zaxium *Singularium Responso- rum* Lib. II. cap. xxxi.

<sup>o</sup> *Vide PUFENDORF. De Jur. Nat. et Gent.* Lib. VII. cap. iv. § 1. et cap. v. § 15. J. B.

conditions of the trust direct. Such conditions belong to other contracts, as well as to the tenure of government. Some leagues with neighbours seem to have been made with such a sanction.

XVII. 1 The Sovereignty may be divided according to its *potential* or its *subjective* parts.

The Sovereignty consists of the parts which we have mentioned [see § VI.], with the addition of irresponsibility: but it may be divided either according to the powers [deliberative, judicial, &c.] or the subjects who are governed. Thus the Roman Empire, though one, was often divided, so that one Ruler had the East, another the West; or into three parts. So too it may happen that a people when it chooses a king may reserve certain acts to itself, and may commit others to the king, *pleno jure*. This is not the case whenever the king is bound by certain promises, as we have shewn; [§ XVI.] but is to be

etiam tripartito orbem regerent. Sic etiam fieri potest, ut populus regem eligens quosdam actus sibi servet, alios autem regi deferat pleno jure. Neque tamen id fit, ut jam ostendimus, quotiescumque rex promissis quibusdam obligatur; sed tunc id fieri intelligendum est, <sup>r</sup>si aut expresse instituat<sup>r</sup> partitio, qua de re supra jam diximus, aut si quid populus adhuc liber futuro regi imperet per modum manentis præcepti; aut si quid sit additum, quo intelligatur regem cogi aut puniri posse. Nam præceptum est superioris, saltem in eo quod præcipitur. Et cogere non est quidem semper superioris: nam et naturaliter quisque jus habet cogendi debitorem, sed cum inferioris natura pugnat. Itaque ex coactione saltem paritas sequitur, ac proinde summitatis divisio.

2 Multi adversus talem statum quasi bicipitem incommoda multa adferunt; sed, ut supra quoque diximus, in civilibus nihil est quod omni ex parte incommodis careat; et jus non ex eo, quod optimum huic aut illi videtur, sed ex voluntate ejus unde jus oritur metiendum est. Exemplum vetus refertur a Platone de legibus tertio. Cum enim Heraclidæ

pp. 683, 684.  
Tom. II.

<sup>r</sup> Si aut expresse instituat<sup>r</sup> partitio] Ita Probi tempore senatus firmabat principum leges; de appellationibus cognoscebat; Proconsules creabat; legatos consulibus dabat. [Habet hoc Auctor e *Vopisco*, in Prob. cap. 13. ubi

legendum *Legatos ex Consulibus*, ostendit *Salmasius*.] Vide et Gail. Lib. II. Observ. LVII. num. 7. et Cardinale Manticam de *Tacitis et Ambiguis Conventionibus*, Lib. XXVII. tit. v. num. 4.

<sup>o</sup> *Ipsi inter se reges populique inter*

understood to happen then, when either the partition of power is expressly instituted, concerning which we have already spoken; or if a people, hitherto free, lay upon the king some perpetual precept; or if anything be added to the compact, by which it is understood that the king can be compelled or punished. For a precept is the act of a superior, at least in the thing commanded: to compel, is not always the act of a superior; for by Natural Law every creditor has the Right of compelling his debtor to pay; but to compel is at variance with the nature of an inferior. Therefore in the case of such compulsion, a parity of powers at least follows, and the Sovereignty is divided.

2 Many persons allege many inconveniences against such a two-headed Sovereignty; but in political matters nothing is quite free from inconveniences; and Rights arise, not from what seems to one or another convenient, but from the will of him who is the origin of Rights. For example, the kings established by the Heraclidæ in Argos, Messena, and Sparta, were bound to govern within the rules of the law; and so long as they did so, the people were bound to preserve the

Argos, Messenam, et Lacedæmonem condidissent, adstricti reges intra præscriptarum legum modum imperare, idque dum facerent obligati populi ipsis ipsorumque posteris regnum relinquere, nec ut quisquam adimeret pati. Inque id non suis tantum regibus populi ac populis suis reges, sed et ipsi inter se reges, populique inter se, et reges vicinis populis, et populi vicinis regibus fidem dederunt, auxilioque se futuros alii aliis polliciti sunt.

XVIII. 1 Multum tamen falluntur qui existimant, cum reges acta quædam sua nolunt rata esse, nisi a Senatu aut alio cœtu aliquo probentur, partitionem fieri potestatis: nam quæ acta eum in modum rescinduntur, intelligi debent rescindi regis ipsius imperio, qui eo modo sibi cavere voluit, ne quid fallaciter impetratum pro vera ipsius voluntate haberetur: quale erat Antiochi tertii regis rescriptum ad magistratus, ne sibi parerent, si quid legibus adversum jussisset; et Constantini, ne pupilli aut viduæ cogantur venire iudicii causa ad comitatum Imperatoris, 'etiãmsi Imperatoris rescriptum proferatur.

Boer. ad c. 1  
de Const. in  
Decret.

Plutarch.  
Apopht. Tom.  
II. p. 183.

L. Unica C.  
quando im-  
perator.

æ] Exempla sunt complura in historia populorum Septentrionalium: vide Johannem Magnum *Historia Suedica* Lib. xv. et xxix. Crantsium *Suedicorum* v. Pontanum *Danicorum* VIII. [pag.

468, et seqq. Ed. Amst. 1631].

'*Etiãmsi Imperatoris rescriptum proferatur*] Adde l. 1. c. de *Petitionibus bonorum sublati*.

throne to them.

Also such engagements have been made, not only between the king and his people, but among different kings, and among different peoples; and between kings and neighbouring peoples; each giving such a *guarantee* to the other.

XVIII. 1 There is no partition of the Sovereignty, in cases when kings allow their own acts not to be valid except when approved by some assembly\*. For acts which are thus rescinded are to be understood to be rescinded by the authority of the king; who provided such a caution against fallacious representations. So Antiochus the Third sent a rescript to the magistrates, that if he commanded anything contrary to the Laws, they should not obey him: and Constantine directed that widows and orphans should not be compelled to come to the Emperor's court for judgment, though a rescript of the Emperor to that effect should be produced.

\* As the king of France has his edicts registered by the Parliament. *Groenovius*.

2 Quare hæc res similis est testamentis, quibus adjectum est, ne posterius testamentum valeat: nam hæc quoque clausula efficit, <sup>1</sup> ut posterius testamentum non ex vera voluntate profectum præsumatur. Sed sicut hæc clausula, ita et illa regis jussu expresso ac speciali posterioris voluntatis significatione tolli potest.

Lib. vi. 9. et seqq.

XIX. Sed neque Polybii hic utor auctoritate, qui ad mixtum genus reipublicæ refert Romanam rempublicam, quæ illo tempore, si non actiones ipsas, sed jus agendi respicimus, mere fuit popularis: nam et Senatus auctoritas, quam ad optimatum regimen refert, et consulum, quos quasi reges fuisse vult, subdita erat populo. Idem de aliorum politica scribentium sententiis dictum volo, qui magis externam speciem et quotidianam administrationem, quam jus ipsum summi imperii spectare congruens ducunt suo instituto.

Poll. III. 15.

XX. 1 Magis ad rem pertinet quod Aristoteles scripsit, inter regnum plenum, quod *παμβασιλείαν* vocat, (eadem est <sup>2</sup> *παντελής μοναρχία*, Sophocli *Antigone*, Plutarcho <sup>3</sup> *αὐτοκρατής βασιλεία καὶ ἀνυπεύθυνος*, Straboni *ἔξουσία αὐτοτελής*) et regnum Laconicum, qui merus est principatus, ali-

Var. 1961.  
De Trib. Gen.  
Rom. p. p.  
286 n.  
Geogr. vi. in  
An. p. 286.

<sup>1</sup> Hoc equidem Juri Romano non congruit, quamquam in Foro obtineat. Vide CUIJACIUM, *Observ.* XIV. 7 et VINCIPIUM in *Instit.* Tit. *Quibus modis Test. infirmantur*, § 2. Sed recepta illa sententia, quam Auctor noster heic probat, et de qua etiam aliquid dicit in *Epist.* Part. II. ep. 10. verior est, secundum Jus Naturale; ut in Notis Gallicis ostendimus. *J. B.*

<sup>2</sup> *Παντελής μοναρχία*] Faciunt enim, ut ad § viii. notavimus, Tragici regnum Thebanum simile regnis Phœnicum, unde orti erant.

<sup>3</sup> *Αὐτοκρατής βασιλεία*] Sic Dionysius Halicarnassensis de *Laconicis regi-*

*bus: οὐδὲ γὰρ οἱ Λακεδαιμόνιοι ἀτοκράτορες ἦσαν· neque enim Lacedæmonii pleno jure reges erant.* (*Ant. Rom.* Lib. II. c. 14).

<sup>1</sup> *Quales habebant vicini*] Putabat populus, ut Josephi verbis utar, *οὐδὲν ἀποπον εἶναι τῶν πλησιοχώρων βασιλευμένων τὴν αὐτὴν ἔχειν αὐτοὺς πολιτείαν· nihil esse absurdum, si, cum vicini regnarentur, ipsi eandem imperii formam acciperent.* (*Ant. Jud.* vi. 4.)

<sup>2</sup> Imitatur loquutionem Taciti, ubi tamen optimæ Editiones habent *adductus*, non *addictus*: *Trans Lygias Gothones regnantur, paullo jam adductus quam cetera Germanorum gentes.* *Germ.*

2 The case is like that of a testament in which it is added that no subsequent testament shall be valid; for this clause has the effect of making a later testament presumed not to be the real will of the testator. But as this clause may be rescinded by an express and special signification of the will of the writer, so may that direction of the king.

XIX. I do not here use the authority of Polybius, who refers the Roman State to the class of mixed Sovereignty. For at that time, if

quot regni species esse interjectas. Ego exemplum hujus rei dari arbitror posse in regibus Hebræis: nam hi quin in rebus plerisque summo jure imperaverint, dubitari nefas arbitror. Voluerat enim populus regem, quales habebant vicini: at orientis populi addicte admodum regnabantur. *Æschylus* Persis de rege Persarum sic loquentem facit Atossam [v. 213]:

οὐχ ὑπεύθυνος πόλει.

Non est civitati obnoxius.

Notam illud Maronis [*Georg.* iv. 210, et seqq.]:

Regem non sic *Ægyptus* et ingens

*Lydia*, nec populi Parthorum, aut *Medus Hydaspes*

Observant.

Apud *Livium*: *Syri et Asiatici genera hominum servituti nata*: a quo non discrepat illud *Apollonii* apud *Philostratum*: Ἀσσύριοι καὶ Μῆδοι τὰς τυραννίδας προσκυνοῦσι. *Assyrii et Medi dominationem etiam adorant.* *Aristotelis* III. *Politicorum* XIV. οἱ περὶ τὴν Ἀσίαν ὑπομένουσι τὴν δεσποτικὴν ἀρχὴν, οὐδὲν δυσχεραίνοντες. *Asiatici dominatum æquo animo ferunt.* Et apud *Tacitum* *Civilis* *Batavi* illud ad *Gallos*: *Servirent Syria Asiaque et suetus regibus oriens*: Lib. xxxvi. 1

vii. *Apoll.*  
vii. 14.

*Hist.* iv. 17.

cap. 43. ubi vid. Int. [V. infra § 4]. *J. B.*

*Servirent Syria Asiaque et suetus regibus oriens*] *Cicero de Provinciis Consularibus* (cap. 5): *Judais et Syris nationibus natis servituti.* *Euripides Helena* (vers. 283):

Τὰ βαρβάρων γὰρ δοῦλα πάντα πλὴν ἑός.  
Sunt præter unum serva cuncta in barbaria.

Quod ex *Æschylo* adumbratum, apud quem est: *Prometh. Vincit.* pag. 8. *Ed. H. Steph.* [v. 60]:

Ἐλεύθερος γὰρ οὖτος ἐστὶ πλὴν Διός.  
Nam nemo liber vivit, extra unum *Jovem*.

Cui simile *Lucani* dictum (II. 280):

toto jam liber in orbe  
Solus *Cæsar* erit.

*Sallustius de Gentibus Orientis* [*Fragm.* ap. *Serv.* ad *Georg.* iv. v. 211]: *Adeo illis ingenta est sanctitas regii nominis.* *Citant* *Servius* et *Philargyrius* ad illum in *Georgicis* (iv. 210) locum. *Apollonius de Damide* apud *Philostratum* libro VII. Ἀσσύριοι γὰρ ὦν καὶ Μῆδοι προσοικίζων οὐδὲν ὑπὲρ ἐλευθερίας ἐνθυμεῖται μέγα. (Cap. 14. *Ed. Olear.*) *Assyrius cum sit et Medorum accola, nihil pro libertate præclarum cogitat.* *Julianus contra Christianos*: τί με χρεὶ καθ' ἕκαστον ἐπιέναι τὸ φιλελεύθερόν τε καὶ ἀνυπότακτον *Γερμανῶν* ἐπεξιόντα, τὸ χειροσθῆς καὶ τίθασσον *Σύρων* καὶ *Περσῶν* καὶ *Πάρθων* καὶ πάντων

we look, not at the acts, but at the right of acting, it was merely democratic: for both the authority of the Senate, which he regards as an aristocracy, and that of the Consuls, whom he considers as kings, was subject to the People. And the same is to be said with respect to other political writers, who regard external appearances and daily administration, rather than the question of Rights.

XX. Examples of mixed Sovereignty. [See the text.]

1 The Hebrew kings were absolute, like other oriental monarchs:

Germ. II.

nam et in Germania, et in Gallia tum reges erant, sed, ut idem Tacitus notat, precario jure regnandi et auctoritate suadendi, non jubendi potestate.

Apolog.  
David. c. 10.

2 Supra quoque notavimus, totum populum Hebræum fuisse sub rege: et Samuel jus regum describens satis ostendit adversus regis injurias nullam in populo relictam potestatem: quod recte colligunt veteres ex illo Psalmi: *Tibi soli peccavi: ad quem locum Hieronymus: <sup>3</sup>Quod rex erat, et <sup>a</sup>alium non timebat.* Et Ambrosius: *Rex erat, nullis ipse legibus tenebatur, quia liberi sunt reges a vinculis delictorum. Neque enim ullis ad pœnam vocantur legibus, <sup>b</sup>tuti imperii potestate: homini ergo non peccavit, cui non tenebatur obnoxius.* Idem legere est apud Isidorum Pelusiotam epistola postremo edita CCCLXXXIII. Video consentire Hebræos, <sup>4</sup>regi in eas leges quæ de officio regis scriptæ exstabant peccanti inflicta verbera: sed ea apud illos infamia carebant, et a regi in signum pœnitentiæ sponte suscipiebantur, ideoque non a lictore, sed ab eo, quem legisset ipse, cædebatur, et suo arbitrio verberibus statuebat modum. A pœnis autem coactivis adeo liberi erant reges, ut etiam excalceationis lex, quippe cum ignominia conjuncta, in ipsis cessaret. Hebræi Barnachmoni sententia exstat in dictis Rabbiorum, titulo de Judicibus: *Nulla creatura judicat regem, sed Deus benedictus.*

[Deut. xxv. 9;  
Ruth iv. 7. c.]

3 Hæc cum ita sint, tamen aliqua judicia arbitror regibus ademta, mansisse penes Synedrium LXX. virum, quod divino imperio a Mose institutum ad Herodis tempora perpetua <sup>5</sup>cooptatione duravit. Itaque et Moses et David iudices Deos

Ezod. xxli 98.  
Psalm. lxxxli. l.

ἀπλῶς τῶν πρὸς ἑω καὶ πρὸς μεσημβρίαν βαρβάρων, καὶ ὅσα τὰς βασιλείας ἀγαπᾷ κερκτημένα δεσποτικώτερας. Quid tibi jam singulatim exsequar aut Germanorum libertatis amantia et impatientia jugi ingenia, aut contra dociles herilem manum ferre Syros, Persas et Parthos, et omnes, qui aut ad orientem aut ad meridiem sunt, barbaros multasque gentes alias contentas sub regibus vivere dominos imitantibus? (Apud Cyrill. pag. 138. Ed. Spanhem.) Claudia- nus (De IV. Cons. Hon. vers. 306):

Non tibi tradidimus dociles servire Sabæos: Armeniæ dominum nec te prefecimus ora.

<sup>a</sup> Nil tale habet Hieronymus, in hunc quidem Psalm. li. locum: sed alibi. Vide SALMASII *Resp. ad Miltonum*, pag. 205. et seqq. ubi plures alios Patres laudat, ita perperam, suo more, verba Davidis exponentes. Circa rem ipsam vide MILTONUM, *Defens. pro Pop. Anglic.* Cap. 2, pag. m. 32. et RABOD. HERMAN. SCHELIUM, *De Jure Imperii*, pp. 255, 256. J. B.

<sup>a</sup> *Alium non timebat*] Idem Hiero-

2 The Hebrew king had peculiar exceptions from the law :

3 Yet some cases were reserved to the Sanhedrim.

vocant, et judicia vocantur judicia Dei: et iudices dicuntur non humana, sed divina vice judicare. Imo aperte distinguuntur res Dei a rebus regis, ubi res Dei, monumentibus doctissimis Hebræorum, judicia ex lege Dei exercenda intelligi debent. Non nego regem Judæorum capitalia quædam judicia per se exercuisse: qua in re ipsum regi decem tribuum Israeliticarum præfert Maimonides: quod et exempla non pauca, tum in sacris literis, tum in scriptis Hebræorum evincunt: sed quædam cognitionum genera regi videntur non permessa, ut de tribu, de pontifice, de propheta. Ejusque rei argumentum est in Jeremiæ prophetæ historia, quem cum proceres ad mortem deposcerent, respondit Rex: *Ecce in potestate vestra est, nam contra vos rex nihil potest*: in hoc negotiorum genere scilicet. Imo et qui alia quavis de causa apud Syndrium reus factus esset, eum rex iudicio eximere non poterat. Ideo Hyrcanus iudicium de Herode (cum impedire non posset) arte elusit.

Deut. i. 17. et  
2 Chron. xix.  
6, 8.

1 Chron. xxv.  
32. et 2 Chron.  
xix. 11.

Jer. xxxviii.  
5.

Jon. Ant. xv.  
cap. 9. § 4.

4 In Macedonia a Carano orti, ut apud Arrianum Callisthenes ait, *οὐ βία ἀλλὰ νόμῳ Μακεδόνων ἄρχοντες διέτέλεσαν* non vi, sed lege in Macedonas imperium obtinebant. Curtius libro iv. *Macedones assueti regio imperio, sed in majore libertatis umbra quam ceteræ gentes*. Nam et judicia de civium capite non erant penes regem. Idem Curtius lib. vi. *De capitalibus rebus vetusto Macedonum modo inquirebat exercitus: in pace erat vulgi: nihil potestas regum valebat, nisi prius valuisset auctoritas*. Est et alterum mixturæ hujus indicium alio Curtii loco: *Macedones scivere gentis suæ*

De Exped.  
Alex. iv. 11.

Cap. vii.  
num. 31.

Cap. viii. n.  
24.

Lib. viii. i.  
n. 18.

nymus *epistola ad Rusticum de Penitentia*: Rex enim erat: alium non timebat: alium non habebat super se. (Tom. i. pag. 221 B.)

<sup>b</sup> *Tuti imperii potestate*] Paria habet ad eundem Psalmum Arnobius minor. Vitiges apud Cassiodorum: *Causa regie potestatis supernis est applicanda iudiciis, quandoquidem illa a celo petita est, ita soli celo debet innocentiam*. [Locus jam adlatus supra ad § viii. num. 16. ubi vide quæ diximus. J. B.]

<sup>c</sup> Mera fabula, quam plenissime confutavit SALMASIUS, *Defens. Reg.* cap. ii.

et post illum alii. Rationes ab utraque parte adlatas collegit SELDENUS, *De Syndriis*, Lib. iii. cap. 9. ubi ipse rem in medio relinquit. J. B.

<sup>b</sup> Perpetuitatem illam, in dubium a quibusdam jam revocata, funditus evertit Clar. CLERICUS, in *Judicio de Hist. Critic. Simonii*, Gallice edito, *Epist. x.* et postea Diss. singulari subjecta *Commentario in Libros Historicos V. T. J. B.*

<sup>c</sup> *De propheta*] *Non capit propheta perire extra Jerusalem*. Luc. xiii. 33.

4 Mixed sovereignty among the Macedonians: the Gothones; the Pheacians:



*more, ne rex pedes venaretur, aut sine electis principum amicorumve.* Tacitus de Gothonibus: *Regnantur paulo jam addictius quam ceteras Germanorum gentes, nondum tamen supra libertatem.* Nam principatum ante descriperat auctoritate suadendi, non jubendi potestate: regnum autem plenum postea his verbis: *Unus imperitat, nullis jam exceptionibus, non precario regnandi jure.* Eustathius ad sextum Odysseæ, ubi Phœacum respublica describitur, ait esse *συνέλευσιν βασιλείας καὶ ἀριστοκρατίας*, <sup>d</sup> *mixtum aliquid ex regis et procerum potestate.*

5 Simile quid in Romanorum regum temporibus observo: nam tum omnia ferme negotia manu regia expediebantur. *Romulus nobis, ut libitum, imperaverat, inquit Tacitus. Constat initio civitatis reges omnem potestatem habuisse, inquit Pomponius: tamen quædam populo excepta, etiam illo tempore, vult Halicarnassensis. Quod si Romanis magis credimus, in causis quibusdam provocationem ad populum a regibus fuisse ex Ciceronis de republica libris, ex pontificalibus quoque libris et Fenestella annotavit Seneca. Mox Servius Tullius, non tam jure quam auris popularibus ad regnum pervectus, plus etiam vim regni imminuit: quippe, ut loquitur Tacitus, Sanctior legum queis etiam reges obtemperarent.* Quominus mirandum quod Livius dicit, primorum consulum potestatem a regia hoc ferme uno distitisse, quod annua esset.

<sup>d</sup> *Mixtum aliquid ex regis et procerum potestate]* Laonicus Chalcocondylas talls ait esse regna Fannonum et Anglorum, libro II, Arragonum Lib. v, et Navarræ eodem libro, ubi ait nec magistratus a rege creatos, nec præsidia imposita nisi volentibus, nec quicquam populo imperatum contra mores. Reges alios esse pleno cum jure, alios sub legibus, etiam Judæus Levi Gersonides notavit ad 1 Sam. VIII. 4. Mira quæ de Taprobane scribit Plinius Lib. VI.

cap. xxii: *Eligi regem a populo senecta clementiaque, liberos non habentem, et, si postea gignat, abdicari, ne fiat hereditarium regnum. Rectores ei a populo xxx. dari, nec nisi plurimam sententia quenquam capite damnari. Sic quoque appellationem esse ad populum: LXX. judices dari. Si liberent ii rem non amplius xxx. [ita enim legi locus hic debet] iis nullam esse dignitatem, gravissimo probro. Regi cultum Liberi patris, ceteris, Arabum. Regem, si quid*

5 Under the Roman kings:

6 In Rome under the early Consuls:

7 In Athens at the time of Solon.

Those points being settled, let us examine certain questions which often occur in this matter.

XXI. 1 First, Whether one who is bound by an unequal alliance can have sovereign power.

6 Similis etiam mixtura ex populari et optimatum potentia Romæ fuit tempore interregni, et primis consulum temporibus: nam in rebus quibusdam, iisque majoribus, ita demum ratum erat quod populus jussisset, \*si Patres auctores fierent: quod postea, vi populi aucta, speciem tantum veterem retinuit, cum in incertum comitiorum eventum Patres auctores fieri cœperunt, ut Livius et Dionysius notant. Quin et serius aliquanto mixturæ mansit aliquid, quamdiu, ut idem loquitur Livius, imperium penes Patricios, (id est, Senatum,) penes tribunos (id est, plebem) auxilium erat, jus nempe vetandi, sive intercedendi.

Liv. l. 17.  
Ant. Rom. II.  
14.

Liv. vi. 37. n.  
4.

7 Sic et Isocrates Atheniensium rempublicam Solonis temporibus vult fuisse δημοκρατίαν ἀριστοκρατία μεμιγμένην, potestatem optimatum populari mixtam. His positis, quaestiones quasdam, quæ frequentem in hoc argumento usum habent, examinemus.

Orat. Penesth.  
p. 265 A.

XXI. 1 Prima est, an summum imperium habere possit is qui inæquali fœdere tenetur? Inæquale fœdus hic intelligo, non quod inter viribus dispares initur, quomodo Thebana civitas Pelopidæ tempore fœdus cum Persarum rege habuit, et Romani olim cum Massiliensibus, deinde cum rege Masanissa: nec quod actum habet transeuntem, ut cum hostis qui sit ad amicitiam recipitur, dum impensas belli solvat, aut aliud quid præstet: sed quod ex ipsa vi pactionis manentem prælationem quandam alteri donat: hoc est, ubi quis tenetur alterius im-

Plutarch. Vit.  
Pelop. p. 394  
D.

Justin. xliii. 5.  
Val. Max. v.  
2. art. n. 4.

*delinquat, morte mulctari, nullo interimento, sed aversantibus cunctis, et commercia etiam sermonis negantibus.* Servius ad illud iv. *Æneidos*: *Populumque patresque. Quidam hoc loco volunt tres partes politia comprehensas, populi, optimatum, regie potestatis.* Cato enim ait de tribus istis partibus ordinatam fuisse Carthaginem. (In vers. 682). [Non videtur necessaria emendatio, quam Auctor noster heic obiter, in loco Plinii, vult fieri: et verba, ut leguntur,

recte exponit Harduinus, not. 7, pag. 324. Tom. 1. *Ed. in fol. J. B.*]

\* *Si patres auctores fierent*] Plutarchus *Coriolano* (pag. 227 κ. *Ed. Wech.*): *ὁ δῆμος ἄκυρος ἦν τοῦ ψήφου καὶ νόμου τι ποιεῖν ἀνευ προβουλεύματος.* *Populus jus non habebat aut legem condendi, aut aliud quid jubendi, nisi Senatus processisset auctoritas.* Similem mixturam in Genuatium republica suis temporibus observat Chalcocondylas libro v.

By an unequal alliance, or unequal league, I do not mean one in which the parties have a different amount of power; as the league of the Thebans with the Persians at the time of Pelopidas; and of the Romans with the Massilians, and afterwards with king Masanissa; nor a league which has a transient operation, as when an enemy is received into amity, on condition of paying the war, or any other consideration; but a league which

perium ac majestatem conservare, ut in fœdere Ætolorum cum Romanis erat, id est, tum operam dare, ut ejus imperium intuto sit, tum ut dignitas, quæ majestatis nomine significatur, ei constet. Imperii reverentiam dixit Tacitus, et sic explicat: *Sede finibusque in sua ripa, mente animoque nobiscum agunt.* Florus: *Illi quoque reliqui, qui immunes imperii erant, sentiebant tamen magnitudinem, et victorem gentium populum Romanum reverebantur;* ad quod genus referenda sunt jura quædam eorum, quæ nunc vocantur protectionis, advocatiæ, mundiburdii: item jus urbium matricum in colonias apud Græcos. Nam, ut Thucydides ait, colonisæ cum urbibus matricibus pari erant jure libertatis, sed debebant *τιμᾶν τὴν μητρόπολιν*, et exhibere *τὰ γέρα τὰ νομιζόμενα*, reverentiam scilicet et honoris signa quædam.

Germ. 29.

Lib. iv. 12.  
n. 61.

Lib. iv. 24, 25.

Lib. i. 52. n. 4.

Nic. Paraph.  
viii. 12. p. 567.L. non dubi-  
ta. D. de  
capt. et post.  
7. § 1.

2 Livius de veteri fœdere inter Romanos, qui Albæ jus omne acceperant, et Latinos Alba oriundos: *In eo fœdere superior Romana res erat.* Recte Andronicus Rhodius, post Aristotelem, amicitis inter dispares hoc ait proprium, ut potentiori plus honoris, infirmiori plus auxilii deferatur. Scimus quid ad hanc quæstionem Proculus responderit, scilicet liberum esse populum, qui nullius alterius potestati subjectus sit, etiam si in fœdere comprehensum sit, ut is populus comiter alterius populi majestatem conservaret. Si ergo populus tali fœdere

\* Legendum cum HALOANDRO: *Næque viribus nobis pares sunt*, &c. J. B.

† *Sic populi fœdere inferiores* Vide Cardinale Tuschum PP. conclus. 10 cccc xxxv. Exemplum habes in Dilimnitis, [vel Dolomitibus, ut alibi vo-

cantur. Vid. Illustr. SPANHEMII *Orb. Rom.* II. 17. pag. 452] qui *αὐτόνομοι* sui que juris Persis militabant, apud Agathiam libro III. (cap. 8.) Sic Irenes consilium fuit, inter mariti liberos ita partiri imperium, ut post natos faceret

of the compact gives a permanent precedence to one of the parties: when for instance, the one party is bound to preserve the authority and majesty of the other, as was the case in the league of the Etolians with the Romans. [See the explanation in the text.] To this relation are referred what are called the Rights of Protectorate, Advocacy, Patronage, and the Rights of the Mother-cities in Greece over their Colonies. [See Thucydides.] So the league between Alba and Rome.

2 This is the characteristic of an alliance between unequals; that the greater share of power goes to the stronger, the greater share of advantage to the weaker. [Andronicus Rhodius.] And a people is free which is not under the power of any other, even though there be a league in which it is stipulated that it shall preserve the majesty of another people: [as Proculus pronounced.] Since therefore a people.

obligatus liber manet, si alterius potestati subjectus non est, sequitur, ut summum imperium retineat. Atque idem de rege pronuntiandum est. Est enim populi liberi et regis, qui vere rex sit, eadem ratio. Addit Proculus, illud adjici in foedere, ut intelligatur alterum populum superiorem esse, non ut intelligatur alterum non esse liberum. Superiorem hic intelligere debemus non potestate (jam enim dixerat talem populum alterius potestati subjectum non esse) sed auctoritate, et dignitate: quod verba sequentia apta admodum similitudine explicant. *Quemadmodum, inquit, clientes nostros intelligimus liberos esse, etiamsi neque auctoritate, neque dignitate, neque jure omni nobis pares sunt: sic et eos, qui majestatem nostram comiter conservare debent, liberos esse intelligendum est.*

3 Clientes in fide sunt patronorum; sic populi foedere inferiores in fide populi, qui dignitate est superior. Sunt ἐπιπροστάταις, οὐχ ὑποτελεῖς, *sub patrocinio, non sub ditione*, ut Sylla apud Appianum loquitur; in parte, non in ditione, ut Livius: et Cicero officiorum secundo sanctiora illa Romanorum tempora describens, patrocinium sociorum ait penes eos fuisse, non imperium: quicum satis convenit dictum illud Scipionis Africani Majoris: *Populum Romanum beneficio quam metu obligare homines malle, exterisque gentes fide ac societate*

ΜΙΛΛ. p. 312.

Lib. xxi.  
Cap. 8.

Lib. xxvi. 49.  
n. 8.

δευτέρου μὲν κατὰ τὸ τῆς τιμῆς ἀξίωμα, αὐτονόμου δὲ καὶ αὐτοκράτορας ἑκάστου, *dignitate quidem minores, ceterum sui juris plenæque potestatis.* Vide Crantsium *Sazonicorum* x. (cap. 3) de urbibus, quæ se in Aus-

triacorum protectionem dedere. Herodianus: Ὀσσηνῶν τε καὶ Ἀρμενίων, ὧν ἦσαν οἱ μὲν ὑπήκοοι, οἱ δὲ φίλοι καὶ σύμμαχοι. *Osroënorum et Armeniorum, quorum hi subditi erant, illi amici ac socii.* Lib. vii. (c. 2.)

bound by such a league is free, it follows that it preserves its sovereignty.

The same may be said of a king; for there is an entire analogy between a free people, and a king who is truly a king. Proculus adds, that though one of the peoples be superior, both are free; *superior* is here understood not of power, but of authority and dignity. So Clients are free, yet inferior to Patrons.

3 Clients are under the protection of their Patrons (*in fide patronorum*); so in an unequal alliance, the inferior people is under the protection of the people superior in dignity. They are under their patronship, not under their authority, *sub patrocinio, non sub ditione*. There are many examples of this distinction, in Appian, Livy, Cicero, Strabo. [See the text.] As private patronship does not take away personal liberty, so public patronship does not take away public liberty,

*junctas habere, quam tristi subjectas servitio: et quæ Strabo commemorat de Lacedæmoniis post Romanorum in Græciam adventum: ἔμειναν ἐλεύθεροι, πλὴν τῶν φιλικῶν λειτουργιῶν ἄλλο συντελοῦντες οὐδὲν manserunt, inquit, liberi, nihil conferentes præter operas sociales.* Sicut patrocinium privatum non tollit libertatem personalem, ita patrocinium publicum non tollit libertatem civilem, quæ sine summo imperio intelligi nequit. Ideo apud Livium opponi videas, <sup>7</sup>in fide esse et in ditione. Et Syllæo Arabum regi minatus est Augustus, teste Josepho, ni injuriis in vicinis abstineret, curaturum se, ut ex amico subditus fieret; cujus conditionis erant reges Armeniæ, quos in ditione Romana fuisse ad Vologesen scribebat Pætus, et proinde sono magis nominis quam re ipsa reges: quales Cypri aliique reges olim sub regibus Persis, ὑποταγέυτες, subditi, ut Diodorus loquitur.

Geogr. viii.  
p. 265.

[De Syllæo  
vide Strabonem.  
Lib. xvi. p.  
781, 783, c.]

[ap. Tacitum  
Ann. xv. 16.]

Lib. xvi. 46.  
p. 634.

4 Obstat his quæ diximus videtur, quod addit Proculus: *At sunt apud nos rei ex civitatibus fœderatis, ei in eos damnatos animadvertimus.* <sup>8</sup>Sed ut hæc res intelligatur, sciendum est quatuor incidere posse controversiarum genera. Primum, si subditi populi aut regis, qui in fide est alterius, dicantur fecisse contra fœdus: deinde, si ipsi populi aut reges accusentur: tertio, si socii, qui in ejusdem populi aut regis fide sunt, inter se litigent: quarto, si subditi conquerantur

<sup>7</sup> Vide, exempli gratia, Lib. viii. cap. i. in fine; et Lib. xxxvi. cap. 28. num. 4. J. B.

<sup>8</sup> Solvitur omnino difficultas, ex illis

verbis petita, adeoque hactenus supervacanea fiunt, quæcumque Auctor subijcit, si animadvertatur, quod verissimum est, Populos, et Reges, qui tunc

which cannot exist without sovereignty. Other kings, on the contrary, were really subjects of the superior power, as the kings of Armenia to the Romans, the kings of Cyprus to the Persian king. [See the authorities: Gronovius adds, for the Armenians, *Florus*, 4, 12.]

4 Proculus adds that *We* (the Romans) *take cognisance of criminals in the federate cities*; which seems at variance with what we have said. To understand this, we must know that there may be four kinds of controversies in such cases. First, if the subjects of the people or king which is under the protection of another, be charged with violation of the terms of the league: secondly, if the peoples or kings themselves be so charged: thirdly, if the allies, who are under the protection of the same people or king, have a dispute among themselves: fourthly, if the subjects complain of wrong done them by those under whose authority they are.

In the first case, if the offence be apparent, the king or people is

de injuriis eorum, quorum sunt in ditione. Prima specie si peccatum appareat, tenetur rex aut populus eum, qui nocuit, aut punire, aut ei cui nocitum est dedere: quod non tantum inter inæquales, sed et inter æqualiter fœderatos locum habet, imo etiam inter eos, qui nullo fœdere tenentur, ut ostendemus alibi. Tenetur etiam dare operam ut damna resarciantur; [IL. xxi. 4.] quod officium Romæ erat recuperatorum. Gallus Ælius apud Festum: *Recuperatio est cum inter populum et reges nationesque ac civitates peregrinas lex convenit, quomodo per recuperatorem reddantur res, recipenturque, resque privatas inter se persequantur.* At sociorum alter in socii subditum jus prehensionis aut punitionis directæ non habet. Itaque Decius Magius Campanus ab Annibale victus et Cyrenas delatus, atque inde deportatus Alexandriam, docuit contra jus fœderis victum se ab Annibale esse: atque ita vinculis liberatus est. Liv. xxiii. 7.

5 Secunda specie jus habet socius cogendi socium, ut stet fœderis legibus, atque etiam puniendi, ni steterit. Sed hoc quoque inæquali fœderi proprium non est. Idem enim locum habet in fœdere æquali. Nam ut quis ultionem sumat ab eo qui peccavit, satis est, ut ipse ei qui peccavit subditus non sit; quod alibi a nobis tractabitur. Quare etiam inter reges aut populos non fœderatos idem usu venit.

temporis a Romanis dicebantur *Fœderati et Liberi*, precariam tantum *ætro-poliam* et libertatem habuisse, ac re vera subjectos et obnoxios fuissæ. Id

luculenter demonstravit vir Illustrissimus, EZECHIEL SPANHEMIUS. *Orb. Rom. Exercit. II. cap. x. J. B.*

bound either to punish the offender, or to give him up to the party whom he has wronged; but this holds good, not only in unequal, but in equal alliances, and even when there is no league in existence, as we shall hereafter shew. They are also bound to see that compensation be made, which was the office of the *Recuperatores* at Rome. [See the definition of *Recuperatio* from Festus.] But one of the allied states has not a direct Right of seizing or punishing the subject of another. So when Annibal seized Decius Magius the Campanian, he pleaded against this as contrary to the federal Rights, and was set at liberty.

5 In the second case, one ally has the power of compelling another to abide by the terms of the league, and even of punishing, if this be not done. But this also is not peculiar to unequal alliances; for the same holds in an equal alliance. For in order to justify any party in doing himself justice upon a wrong-doer, it is sufficient that he be not himself the subject of the offender; a case elsewhere to be

6 Tertia specie sicut in fœdere æquali solent controversiæ deferri ad <sup>5</sup>conventum sociorum, quos scilicet res non tangit, ut Græcos, Latinos veteres, et Germanos olim fecisse legimus; aut alioqui ad arbitros, aut etiam ad principem fœderis tanquam communem arbitrum: ita in fœdere inæquali plerumque convenire solet, ut controversiæ disceptentur apud eum, qui superior est in fœdere. Quare ne hoc quidem ostendit imperii potestatem. Nam et reges apud iudices a se constitutos iudicio contendere solent.

7 In postrema specie jus cognoscendi nullum est sociis. Ideo cum Herodes quædam adversus liberos ad Augustum sua sponte deferret, dixerunt illi: *Poteras de nobis supplicium sumere tuo jure, tum qua pater, tum qua rex.* <sup>h</sup>Et Scipio, cum Romæ a Carthaginensium quibusdam Annibal accusaretur, dixit non oportere se Patres Conscriptos reipublicæ Carthaginensium interponere. Et hoc est, in quo Aristoteles ait societatem a civitate differre, quod socii curæ sit, ne injuria in ipsos committatur, non vero ne sociæ civitatis cives inter se injurias committant.

8 Solet et illud objici, quod in historiis ei qui fœdere superior est imperandi, et ei qui inferior est parendi vox interdum tribuitur. Sed nec hoc movere nos debet: aut enim agitur de rebus ad commune bonum societatis pertinentibus, aut

<sup>5</sup> *Conventum sociorum*] Talis conventus vocatur *κοινοδικιον* in veteri columna *ισοπολιτειαν* sive communicatæ civitatis Priansiorum et Hieropotamiorum. [Immo Hierapytniorum, ut ha-

bet Inscriptio, primum edita a J. Priæso, not. in Apuleii *Apolog.* pag. 59, et seqq. postea inter *Marmora Oxoniensia*, pag. 116, et seqq. Vide et *Orbem Romanum III.* SPANHEMII, I. 4 et II. 16,

treated. And therefore this is practised between kings and peoples not federate.

6 In the third case, as, in equal alliances, the dispute is commonly referred to a convention of the allies who are not interested in the dispute, as we read that the Greeks, antient Latins, and Germans used to do; or otherwise, to arbiters, or to the Head of the League as a common arbiter: so, in unequal alliances, it is commonly agreed that disputes are to be settled by reference to him who is the superior in the alliance. But this also does not prove superior authority; for even kings are accustomed to have pleas before judges appointed by themselves.

7 In the fourth case, the allies have no Right of Cognisance. So when Herod made accusations against his sons to Augustus, they pleaded that he himself, both as father and as king, had cognisance of

Joe. xvi. 4.  
§ 3.

Val. Max. iv.  
cap. 1. n. 6.  
[Liv. xxxiii.  
47. c.]  
Pol. iii. 9.

de utilitate privata ejus, qui superior est in fœdere. In rebus communibus, extra tempus conventus, etiam ubi fœdus æquale est, solet is, qui lectus est princeps fœderis (דָּנִיֵּל דְּבָרַיִם Daniel. xi. 22) sociis imperare, ut Agamemnon regibus Græcis, Lacedæmonii Græcis postea, deinde Athenienses. In oratione Corinthiorum apud Thucydidem legimus: *χρὴ τοὺς ἡγεμόνας τὰ ἴδια ἐξ ἴσου νέμοντας, τὰ κοινὰ προσκοπεῖν, De- cap. 150. cet eos, qui fœderis principes sunt, circa suas quidem utilitates nihil præcipuum sumere, at in communibus rebus curandis eminere supra ceteros.* Isocrates veteres Athenienses ductum exercuisse ait, *ὄλων ἐπιστατοῦντας, ἴδια δ' ἐκάστους ἐλευθέρους ἐῶντας εἶναι· curam gerentes pro sociis omnibus, sed ita ut iis libertatem integram relinquerent.* *Panegy. p. 63 c.* Et alibi: *στρατηγεῖν οἰομένους δεῖν, ἀλλὰ μὴ τυραννεῖν, ita ut imperium habere belli, non dominari se debere censerent.* *Ibid. p. 66 n.* Item: *συμμαχικῶς, ἀλλ' οὐ δεσποτικῶς βουλευομένους περὶ αὐτῶν, socialiter, non heriliter res eorum curantes.* *Ibid. p. 62 c.* Hoc ipsum Latini imperare, Græci modestius *τάσσειν* dicunt. Athenienses delato sibi ductu belli in Persas, *ἔταξαν*, inquit Thucydides, *ὡς τε εἶδει παρέχειν τῶν πόλεων χρήματα πρὸς τὸν βάρβαρον καὶ ὡς ναῦς· ordinarunt* (sic qui Roma in Græciam mittebantur, dicebantur mitti *ad ordinandum statum liberarum civitatum*) *quæ urbes pecunias in barbarum, quæ*

p. 426. J. B.]

<sup>b</sup> Et Scipio] Vide Polybium in legationum excerpto cv.

<sup>c</sup> Immo rerum omnium: est enim in Græco *πραγμάτων*, ab Auctore omis-

sum, qui ne quidem Orationem, ubi hæc omnia leguntur, indicabat. J. B.

<sup>d</sup> Ad ordinandum statum liberarum civitatum] Plinius *epistolarum* VIII. 24.

them. So when some of the Carthaginians complained to Rome against Annibal, Scipio said that the Senate ought not to interfere in the interior matters of Carthage. And so Aristotle says that an Alliance differs from a single State in this; that Allies provide against their own mutual injuries, but not against the mutual injuries of the citizens of one of the Allied States.

8 In unequal alliances, the words *command* and *obedience* are sometimes used with reference to transactions between the superior and inferior: but this does not refute what we have said. Such terms are either used of things tending to the common good of the alliance, or to the private advantage of the superior.

In common things, at times when the common convention is not assembled, the Head of the League usually gives commands to the allies; as Agamemnon to the Greek kings; and the Lacedæmonians



nutum Romanorum fieri. Sic Thessalos in speciem fuisse liberos, sed revera sub imperio Macedonum notat Polybius.

Hist. iv. 76.

11 Hæc cum fiunt, et ita fiunt ut potentia in jus transeat, qua de re alibi erit disputandi locus, tunc aut qui socii fuerant fiunt subditi, aut certe partitio fit summi imperii, qualem accidere posse supra diximus.

Lib. I. § 19.

Bell. Civ. v. p. 715.

XXII. <sup>m</sup> Qui vero certum quid pensitant aut ad redimendas injurias, aut ad tutelam comparandam, *σύμμαχος φόρου ὑποτελείς*, ut est apud Thucydidem: quales <sup>n</sup> Hebræorum reges, et vicinarum gentium post Antonii tempora, *ἐπὶ φόροις τεταγμένοις*, ut Appianus loquitur: quo minus summum imperium habere possint, nullam dubitandi causam video, quanquam infirmitatis confessio de dignitate aliquid delibat.

XXIII. 1 Difficilior multis videtur quæstio de nexu

<sup>m</sup> Qui vero certum quid pensitant] Persæ pecuniam annuam ab Justiniano accipiebant, qua de re vide Procopium *Persicorum* II. (cap. 10) et *Gothicorum* IV. (cap. 15) id molli vocabulo vocabatur stipendium ad tutandas portas Caspias. Turcæ Arabas montanos pecunia placant.

<sup>n</sup> Hebræorum reges] Josephus, Lib. XV. οὐ γὰρ ἔφη καλῶς ἔχειν Ἀντώνιος βασιλεία περὶ τῶν κατὰ τὴν ἀρχὴν γεγενημένων εὐθύνας ἀπαιτεῖν. οὕτως γὰρ ἂν οὐδὲ βασιλεὺς εἶη· δόντας δὲ τὴν τιμὴν καὶ τῆς ἐξουσίας αὐτεξουσίαν, ἔῃν αὐτῆ χρῆσθαι. [Locus

est cap. III. § 8. *Ed. Hudson.* ubi pro *αὐτεξουσίαντας*, ut heic scribitur, est *καταξιώσαντας*, etiam in veteri edit. *J. B.*] *Negabat Antonius rectum esse, regem vocari ad rationes reddendas de iis, quæ ut rex fecisset: ita enim ne regem quidem eum fore. Par esse, ut qui bonorem ei dederint, etiam potestate quam liberrime uti eum sinant.* Chrysostomus II. *de Eleemosyna*: *ἐπειδὴ τὰ τῶν Ἰουδαίων μετέπεσε πράγματα καὶ λοιπὸν ὑπὸ τὸν Ῥωμαίων ἐτέθησαν ἀρχὴν, οὕτε αὐτόνομοι ἦσαν, καθάπερ καὶ πρότερον, οὕτε καθόλου δούλοι, καθάπερ καὶ νῦν. ἀλλ' ἐν τάξει συμ-*

11 When this happens, and such Power becomes a Right, a case which we shall have to treat hereafter, then those who had been Allies become Subjects; or at least there is a partition of the Sovereignty; which, as we have above said, may take place in certain circumstances.

XXII. The payment of money to the Superior does not destroy Sovereignty; whether it be a compensation for injury done, or a consideration for protection. Such cases happened among the Greeks; and to the kings of the Hebrews and of the neighbouring nations after the time of Antonius: but such payment is a confession of weakness, and may derogate something from the dignity of the State which makes it.

XXIII. 1 The question of the Feudal Relation is more difficult; but it may be easily solved by what precedes. This contract is peculiar to the German nations, and is nowhere found except where the Germans have established themselves. In it two things are to be

feudali, sed quæ ex antedictis facile solvi potest. Nam in hoc contractu, qui proprius est Germanicarum Gentium, neque usquam invenitur, nisi ubi Germani sedes posuerunt, duo sunt consideranda, obligatio personalis, et jus in rem.

2 Obligatio personalis eadem est, sive quis ipsum jus imperandi, sive aliud quidvis etiam alibi situm feudi jure possideat. Talis autem obligatio sicut privato non erat demtura jus libertatis personalis, ita nec regi aut populo jus demituræ summi imperii, quæ libertas est civilis. Quod apertissime conspici datur in feudis liberis, quæ Franca vocant, quæ nullo jure in rem, in sola personali obligatione consistunt. Hæc enim nihil sunt aliud quam species fœderis inæqualis, de quo egimus, quo alter alteri operam pollicetur, alter alteri præsidium et tutelam. Pone etiam adversus omnes promissam

*μάχων ὄντες διετέλου, φόρου μὲν τελούντες τοῖς βασιλεῦσιν ἑαυτῶν· καὶ τοὺς παρ' ἐκείνων ἄρχοντας δεχόμενοι. Τέλλαχού δὲ τοῖς ἰδοῖς κερχημένοι νόμοις, καὶ τοὺς παρ' αὐτοῖς ἀμαρτάνοντας κατὰ τὰ πάτρια κολάζοντες νόμιμα· Ἰουδαί, ἐξ quo retro ferti res eorum capere, Romano attributi imperio, neque in plena, ut ante, erant libertatis: neque tamen ita, ut nunc, omnino servi, sed sociorum vocabulo honorabantur, regibus suis tributa pendentes, et ab iis accipientes prefectos. Ceterum in plerisque suis utebantur legibus, ita ut et popularium delinquentes*

*ipsi punirent secundum mores patrios.* Tom. vi. pag. 818. *Ed. Savil.* Heic autem, ubi est, τοῖς βασιλεῦσιν ἑαυτῶν legendum αὐτῶν: quemadmodum recte observavit DESID. HERALDUS, *De Rerum judicat. auctor.* Lib. II. cap. 16, num. 11. Res ipsa, et series orationis, docent, agi, non de Regibus Judæorum, sed de Imperatoribus Romanis, qui βασιλεῖς Græcis dicebantur, et quibus Judæi tunc temporis tributa pendebant.]

<sup>1</sup> Confundit Auctor *Feuda libera* cum certis quibusdam pactis, quæ improprie *Feudorum* nomine adpellata sunt ob similitudinem quamdam in exhibi-

considered, the Personal Obligation, and the Right of Real Property.

2 The Personal Obligation is the same, whether any one [the Superior Lord] by the Feudal Law possesses the Right of Command, or any other Right, over a thing situated at a distance from him. As such an Obligation would not take away the Right of personal liberty [in the person subject to such command], so neither does it take away from a king or a people the Right of Sovereignty, which is civil liberty. This is most apparent in those Free Fiefs which are called *Frank Fiefs*, which consist solely in the Personal Obligation, without any Right to Real Property. For these are only a kind of unequal alliance, such as we have spoken of; in which one party promises to the other aid, [for instance, Military Service,] and the other party promises Protection and Guardianship. Even if the condition be aid promised [by the Vassal] against every other party, which is

operam, °quod nunc feudum ligium vocant, (nam olim ea vox latius patebat) nihil id de jure summi imperii in subditos detrahit: ut jam taceam semper inesse conditionem tacitam, dum justum sit bellum, de qua agendum erit alibi.

3 Jus vero in rem quod attinet, id quidem tale est, ut ipsum imperandi jus, si feudi jure teneatur, aut familia extincta, aut etiam ob certa crimina amitti possit. Sed interim summum esse non desinit: aliud enim est res, ut sæpe diximus, aliud rem habendi modus. Et tali jure multos video reges a Romanis constitutos, ita scilicet, ut deficiente regia familia imperium ad ipsos rediret, quod de Paphlagonia aliisque nonnullis Straboni notatum.

XXIV. Distinguendum quoque non minus in imperio quam in dominio jus ab usu juris, sive actus primus ab actu secundo. Nam sicut rex infans jus habet, sed imperium exercere non potest: sic et furiosus, et captivus, et qui in alieno territorio ita vivit, ut actiones circa imperium alibi situm liberæ

tionem honoris. Ostendimus id in Gallicis nostris ad hunc locum notis. Videri potest etiam G. DANIELIS, e Soc. Jes. Opus Gallicum *De Militia Francica*, Tom. 1. pag. 106, et seqq. Edit.

Amstel. 1724. J. B.

• *Quod nunc feudum ligium vocant*  
Vide Baldum *Proœmio Digestorum*,  
Nattam consilio CCCCLXXXV.

what is now called a *Liege Fief*, that does not detract anything from his [the Vassal's] sovereignty; not to mention that there is always included a tacit condition, that the war be just; which we shall treat of elsewhere.

3 As to the Right of Real Property [belonging to the Feudal Vassal], that is doubtless such, that the Right of Command, if it be held in virtue of the Fief, may be lost by the extinction of the Tenant's family, and also for certain crimes. But in the mean time it does not cease to be Sovereign; for, as we have repeatedly said, (§ xi. 1) we must distinguish between what a thing is, and the kind of possession of it. And we find that many kings were established by the Romans on that condition, that if their family failed, the authority should revert to the Romans; as in Paphlagonia.

XXIV. And thus in political authority, as in private property, we must distinguish Right from the use of Right; or [in the language of the Schoolmen] the *actus primus* from the *actus secundus*. A king who is an infant has the Right, but cannot exercise it; so one who is insane, captive, or who lives in the territory of another so that his actions with regard to the exercise of his remote kingdom are not freely done. In all these cases there are to be established Guardians

ei non permittantur; omnibus enim his casibus curatores sive prodici dandi sunt. Itaque <sup>p</sup>Demetrius, cum in potestate Seleuci non satis libere viveret, vetuit aut sigillo aut literis suis credi, sed omnia quasi se mortuo administrari voluit.

<sup>p</sup> *Demetrius*] Vide Plutarchum *Demetrio*. (pag. 914 D. *Ed. Weck.*)

---

or Regents. So Demetrius, when he was living under constraint in the power of Seleucus, forbade that credence should be given to his Seal or his Letters, and directed every thing to be administered as if he were dead.

---

## CAPUT IV.

### DE BELLO SUBDITORUM IN SUPERIORES.

- |   |  |
|---|--|
| I. <i>Status quæstionis.</i>  | <i>net, ad impediendam traditionem tantum.</i>   |
| II. <i>Bellum in superiores, quales, ordinarie licitum non esse jure naturæ.</i>  | XI. <i>In regem, qui manifeste totius populi hostem se ferat.</i>                            |
| III. <i>Nec concessum lege Hebræa.</i>  | XII. <i>In regem post amissum regnum ex lege commissoria.</i>                                |
| IV. <i>Minus etiam lege Evangelica: quod probatur ex sacris literis.</i>  | XIII. <i>In regem, qui partem duntaxat imperii habeat, pro ea parte, quæ ipsius non sit.</i> |
| V. <i>Et factis Christianorum veterum.</i>  | XIV. <i>Si resistendi libertas certis casibus reservata sit.</i>                             |
| VI. <i>Refollitur sententia statuens inferioribus magistratibus licitum esse bellum adversus summam potestatem: idque rationibus et sacris literis.</i> | XV. <i>Invasori alieni imperii quatenus parendum.</i>  |
| VII. <i>Quid sentiendum, si summa et alioqui inevitabilis sit necessitas?</i>   | XVI. <i>Invasori alieni imperii vi resisti posse ex jure belli manentis.</i>                 |
| VIII. <i>Jus belli dari posse in principem populi liberi.</i>   | XVII. <i>Ex lege antecedente.</i>  |
| IX. <i>In regem, qui imperium abdicaverit.</i>  | XVIII. <i>Ex mandato jus imperandi habentis.</i>   |
| X. <i>In regem, qui regnum alienet, ad impediendam traditionem tantum.</i>  | XIX. <i>Cur extra hos casus id non liceat.</i>   |
|   | XX. <i>In controverso jure privatos sibi judicium sumere non debere.</i>                     |

I. 1 **B**ELLUM gerere possunt et privati in privatos, ut viator in latronem; et summum imperium habentes in eos, qui itidem id habent, ut David in regem Ammonitarum; et privati in eos, qui imperio summo, at non in se, utuntur, ut Abrahamus in regem Babylonis et vicinos; et qui summum imperium habent in privatos aut sibi subditos, ut

---

#### CHAPTER IV. *Of the war of Subjects against Superiors.*

I. 1 War may be carried on by private persons against private persons, as by a traveller against a robber; and by sovereigns against sovereigns, as by David against the king of the Ammonites; and by private persons against those who are sovereigns of others, but not of them, as by Abraham against the king of Babylon and his neighbours; and by Sovereigns against private persons, either their own subjects, as

David in partem Isbosethi, aut non subditos, ut Romani in piratas.

2 Tantum illud quæritur, an aut privatis aut publicis personis bellum gerere liceat in eos, quorum imperio sive summo sive minori subsunt? Ac primum id minime controversum est, arma sumi posse in inferiores ab iis, qui summæ potestatis auctoritate armantur: qualis fuit Nehemias armatus edicto Artaxerxis adversus vicinos regulos. Sic metatores expellendi domino prædii licentiam Imperatores Romani concedunt. Verum adversus summam potestatem aut inferiores, sed agentes quod agunt summæ potestatis auctoritate, quid liceat quæritur.

*L. Desotum.  
C. de Metatoribus. Lib.  
xii. leg. 5.*

3 Illud quidem apud omnes bonos extra controversiam est, si quid imperent naturali juri aut divinis præceptis contrarium, non esse faciendum, quod jubent. Nam Apostolicum dixerunt Deo magis quam hominibus obediendum, ad certissimam provocarunt regulam, omnium inscriptam mentibus, quam totidem ferme verbis expressam apud Platonem reperias: at si qua ex tali causa, aut alioqui quia summum imperium habenti ita libet, injuria nobis inferatur, ea toleranda est potius, quam vi resistendum.

*Apol. Secret.  
p. 29 D.*

by David against the party of Ishbosheth, or not their own subjects, as by the Romans against the pirates.

2 But we have now to inquire only whether it be lawful either for private or for public persons to carry on war against those who have over them an authority either sovereign or subordinate.

And in the first place, it is not controverted that those who are armed with the authority of the supreme power may take arms against inferior authorities; as was the case when Nehemiah was armed with the edict of Artaxerxes against the chiefs of the neighbouring country. So the Roman emperors concede to the owner of the soil the liberty to expel those who would lay down the lines of a camp there.

But we inquire what is lawful against the supreme power, or inferior powers acting under the authority of the supreme power.

3 It is beyond controversy among all good men, that if the persons in authority command any thing contrary to Natural Law or the Divine Precepts, it is not to be done. For the Apostles, in saying that we must obey God rather than man, appealed to an undoubted rule, written in the minds of all, which you may find, almost in the same words, in Plato. But if we receive any injury from such a cause, or in any other way from the will of the Supreme Power, we are to bear it rather than resist by force.

II. 1 Et naturaliter quidem omnes ad arcendam a se injuriam jus habent resistendi, ut supra diximus. Sed civili societate ad tuendam publicam tranquillitatem instituta, statim civitati jus quoddam majus in nos et nostra nascitur, quatenus ad finem illum id necessarium est. Potest igitur civitas jus illud resistendi promiscuum publicæ pacis et ordinis causa prohibere: Et quin voluerit, dubitandum non est, cum aliter non posset finem suum consequi: <sup>1</sup>nam si maneat promiscuum illud resistendi jus, non jam civitatis erit, sed dissociata multitudo, qualis illa Cyclopyum:

Hom. *Odys.*  
ix. v. 114.

Θεμιστεύει δ' ἕκαστος  
Παίδων ἦδ' ἀλόχων.  
Dant conjugibus jus  
Quisque suis sobolique.

Eurip. *Cyclop.*  
v. 730.

Νομάδες ἀκούει δ' οὐδὲν οὐδεὶς οὐδέως.  
\*Confusa turba, nemo ubi audit neminem.

*Bell. Catt.* 6. Et Aboriginum, qui Sallustio tradente, genus hominum agreste, sine legibus, sine imperio, liberum atque solutum: et apud eundem alio loco Getuli, qui neque moribus, neque lege aut imperio cujusquam regebantur.

Jugurth.  
[[14]].

*Confess.* III. B.  
*Prom. Vinc.*  
[[v. 384]].

2 Ita, ut dixi, habent mores omnium civitatum: *Generale pactum est societatis humanæ*, inquit Augustinus, *regibus obedire*. Æschylus:

<sup>1</sup> Distinguendum heic inter *inurias dubias aut tolerabiles*, et *manifestas ac intolerandas*. Quæ prioris generis sunt, eas pati quisque debet, non propter Principem, qui ne quidem minimam injuriam inferendi jus habet, sed ne societas civilis turbetur. Posterioris autem generis nemo pati tenetur, easque repelli finis ipse civitatum constitutarum

postulat, tantum abest ut vetet. Quæ de re plenius dicemus in nostris ad hoc Caput Notis Gallicis. Heic monuisse sufficiat. *J. B.*

\* *Confusa turba, nemo ubi audit neminem*] *De Bebryciis similia prodidit* Valerius (*Argon.* IV. 102):

non fœdera legum  
Ulla colunt, placidas aut jura tenentia mentes.

II. 1 By Natural Law, all have the Right of repelling wrong. But civil society being instituted to secure public tranquillity, the State acquires a Superior Right over us and ours, as far as is necessary for that end. Therefore the State may prohibit that promiscuous Right of resisting, for the sake of public peace and order: and it is to be presumed to have intended this, since it cannot otherwise attain its end. If this prohibition does not exist, there is no State, but a multitude without the tie of society. So the Cyclops are described by Homer and Euripides; so the [hypothetical] Aborigines, and the Getuli, by Sallust. [See the references.]

Τραχὺς μόναρχος κοῦχ ὑπεύθυνος κρατεῖ.

Rex est suo utens jure, nulli obnoxius.

Sophocles [*In Ajax*. ver. 668] :

Ἄρχοντες εἰσω, ὡςθ ὑπεκρίων. τί μή;

Nam principes sunt: obsequendum: quippe ni?

Euripides [*Phœniss*. ver. 393] :

Τὰς τῶν κρατούντων ἀμαθίας χρεῶν φέρειν.

Imperia habentum perferenda inscitia est.

Adde quod supra ex Tacito in hanc rem adduximus: cujus et hoc est; *Principi summum rerum arbitrium Dii dederunt, Ann. vi. 8. subditis obsequii gloria relicta est.* Hic quoque<sup>2</sup>:

Indigna digna habenda sunt, rex quæ facit.

Seneca: *Æquum atque iniquum regis imperium feras:* Medea, v. 196.

Quod ex Sophocle sumtum, qui dixerat [*Antigon*. ver. 667] :

Ἄλλ' ὃν πόλις στήσει, τοῦδε χρὴ κλύειν

Καὶ συμκρὰ καὶ δίκαια καὶ τᾶναντία.

Et quod apud Sallustium est: <sup>b</sup> *Impune quidvis facere, id est regem esse*<sup>3</sup>.

3 Hinc ubique majestas, id est, dignitas, sive populi, sive unius, qui summo fungitur imperio, tot legibus, tot pœnis defenditur: quæ constare non potest, si maneat resistendi licentia. Miles qui castigare volenti se centurioni restiterit,

*L. Miltæ. 13.  
§ Iracrosus.  
4. D. de re mil.  
Rufus de  
legibus mil-  
taribus. 15.*

<sup>a</sup> Parodia versus Plantini: *Indigna digna habenda sunt, herus quæ facit. Captiv. II. 1. 6. J. B.*

<sup>b</sup> *Impune quidvis facere, id est, regem esse*] Pertinent huc M. Antonii verba, quæ ex Josepho modo adduximus. (Cap. præced. § 22).

<sup>c</sup> Verba sunt Memmii, Tribuni Plebis, qui loquitur tantum de more Regum, et

impunitate facti, non juris: quam ipsis nequaquam largiturus erat libertatis vindex acerrimus. Inspice totum locum, *Bell. Jugurth. c. 36.* Si alia loca congesta expendantur, nil aliud in plerisque reperietur, immo aliquando contrarium ejus, quod inde Auctor colligit. *J. B.*

2 Such a prohibition of force, then, is the usage of all society. It is the general pact of human society, says Augustine, to obey kings. So Æschylus, Sophocles, Euripides, Tacitus, Seneca, who took it from Sophocles, and Sallust. [See the passages. The line *Indigna habenda sunt, rex quæ facit*, is a parody of a line in Plautus, *rex* being put for *herus*. *Captiv. II. 1. 6. J. B.*]

3 Hence the majesty, that is, the dignity of the Sovereign, whether he be king or people, is defended by so many laws, so many penalties. The soldier, who, when the centurion has to scourge him, resists and seizes the vine-stalk (the instrument of punishment), is cashiered; if



si vitem tenuit, militiam mutat: si ex industria fregit, vel manum centurioni intulit, capite punitur: Et apud Aristotelem est, *εἰ ἀρχὴν ἔχων ἐπάταξεν, οὐ δεῖ ἀντιπληγῆναι, σὶ magistratum gerens aliquem verberavit, reverberandus non est.*

*Ethic. Nic.*  
v. 8.

*Deut. xvii. 12.*  
*Jos. i. 18.*

III. In lege Hebræa mortis supplicio damnatur, qui inobediens fuerit aut summo pontifici, aut ei qui extra ordinem rector populi a Deo esset constitutus. Quod vero apud Samuelem est de jure regis, omnino recte inspicienti apparet, nec de jure vero intelligendum, id est, de facultate honeste et juste aliquid agendi, (longe enim alia vivendi ratio præscribitur regi in ea parte legis, quæ est de officio regis) neque nudum <sup>4</sup>factum indicari: nihil enim esset in eo eximium, cum injurias facere etiam privati privati soleant: sed factum quod effectum aliquem juris habeat, id est, <sup>c</sup>non resistendi obligationem. Ideo additur, populum pressum istis injuriis Dei opem imploraturum, quia scilicet humana remedia nulla extarent. Sic ergo hoc jus vocatur, quomodo prætor jus reddere dicitur, etiam cum inique decernit.

*1 Sam. viii. 11.*

*Deut. xvii. 14.*

*L. Jus Pluribus D. de Just. et Jure.*  
ii.

IV. 1 In novo fœdere Christus præcipiens dari Cæsari, quæ Cæsaris sunt, intelligi voluit a suæ disciplinæ sectator-

<sup>4</sup> Immo *jus Regis* apud SAMUELEM significare tantum *consuetudinem* Regum, probarunt Interpretes exemplis et rationibus omni exceptione majoribus. Diximus in Gallicis nostris Notis. *J. B.*

<sup>c</sup> *Non resistendi obligationem*] Philo in *Flaccum* [pag. 978 v. *Ed. Paris.*]: *πότε γὰρ εἰς ἀπόστασιν ὑπακτεύθημεν; πότε δ' οὐκ εἰρημικὸν πᾶσιν ἐνομίσθημεν; τὰ δ' ἐπιτηδεύματα, οἷς καθ'*

he breaks it on purpose, or lays a hand on the centurion, his offence is capital. And Aristotle says, *If a magistrate strikes any one, the blow is not to be returned.*

III. So in the Hebrew law, he was condemned to death who was disobedient either to the high priest, or to a Ruler of the people, appointed by God in an extraordinary manner. The passage 1 Sam. viii. 11, [*This will be the manner of the king over you: He will take your sons, &c.*] if carefully examined, appears not to imply a true Right, (for a very different course of conduct is prescribed in the law when the duty of the king is spoken of;) nor a mere Fact; (for the fact of a king doing this would not be peculiar, since some private persons also do injuries to others;) but a Fact which has a peculiar effect, that this being done by the king, there is an obligation of not resisting. And therefore it is added that the people so oppressed shall cry out to God for help, namely, because no help of man is to be had. So that this exercise of power is called the king's *Right*, as the judge is said to *do Right* to the parties, even when he judges wrong.

ibus non minorem, si non majorem, obedientiam cum patientia (si opus sit) conjunctam summis potestatibus deberi, quam ab Hebræis regibus Hebræis debebatur: quod latius exsequens optimus ejus interpret Paulus Apostolus, officia subditorum late describens, inter alia, *Qui obsistit, inquit, potestati, Dei ordinationi obsistit: tum vero qui obsistunt, sibi ipsis condemnationem accipient.* Addit mox, *Dei enim minister est, qui potestate fungitur tuo bono.* Deinde, *Quapropter necesse est subjici, non solum propter iram, sed et propter conscientiam.* In subjectione includit non resistendi necessitatem, neque eam solum quæ ex formidine majoris mali oritur, sed quæ ex ipso sensu officii nostri manat, neque hominibus tantum, sed et Deo nos obligat. Rationes addit duas: primam, quod Deus ordinem illum imperandi, et parendi approbaverit, et olim in lege Hebræa, et nunc in Evangelio: quare potestates publicæ eo loco nobis habendæ sunt, quasi ab ipso Deo essent constitutæ. Nostra enim facimus, quibus auctoritatem nostram impartimur. Alteram, quod hic ordo nostro bono inserviat.

Rom. xiii. 2,  
et seqq.

2 Atqui, dicat aliquis, injurias pati utile non est. Hic quidam, vere magis quam ad sensum Apostoli, ut arbitror,

*ἰκάστην ἡμέραν χρώμεθα, οὐκ ἀνεκί-  
ληπτα, οὐ συντείνοντα πρὸς εὐνοίαν  
πόλεως καὶ εὐσταθείαν; Quando enim  
defectionis suspecti fuimus? quando  
non pacis amantes ab omnibus judicati*

*sumus? instituta vero, quibus utimur  
quotidie, nonne extra reprehensionem  
sunt, nonne ad concordiam bonumque  
statum civitatis conducunt?*

IV. 1 In the New Testament, Christ, when he commands us to give to Cesar the things that are Cesar's, gives it to be understood that his disciples must pay as much obedience to the powers that be as was due from the Hebrews to the Hebrew kings; if not more; and this, joined (if need be) with endurance of evil. Paul interprets this excellently, Rom. xiii. 2 et seqq. In the subjection which he recommends, he includes the obligation of not resisting; and not only the obligation to this which arises from fear, but that which flows from a sense of duty, and is an obligation, not towards man only, but towards God. He adds two reasons; first, that God has approved the order of command and obedience, both formerly in the Hebrew Law and now in the Gospel; wherefore the public powers are to be regarded by us as if they were ordained of God; for a person makes that his act to which he imparts his authority. The other reason is, that this order promotes our good.

2 But some will say it is not for our good to suffer injuries. Here some reply, with more truth than pertinence to the apostle's meaning

apposite, dicunt, has quoque injurias utiles nobis esse, quia ista patientia sua non sit caritura mercede. Mihi videtur Apostolus considerasse finem universalem isti ordini propositum, qui est <sup>d</sup>tranquillitas publica, in qua et singulorum comprehenditur. Et sane quin plerumque hoc bonum per potestates publicas consequamur, dubitandum non est: nemo enim sibi male vult: at imperantis felicitas in subditorum felicitate consistit. <sup>e</sup>*Sint quibus imperes*, aiebat ille. Proverbium est apud Hebræos: <sup>f</sup>*Nisi potestas publica esset, alter alterum vivum deglutiret*: qui sensus et apud Chrysostomum: τῶν πόλεων τοὺς ἄρχοντας ἂν ἀνέλῃς, θηρίων ἀλόγων ἀλογώτερον βιωσόμεθα βίον, δάκνοντες ἀλλήλους καὶ κατεσθίοντες, nisi rectores civitatum essent, feriozem feris viveremus vitam, non mordentes tantum, <sup>g</sup>sed et vorantes alios alii.

3 Quod si quando nimia formidine aut iracundia aliisve affectibus transversi agantur rectores, quo minus rectam ineant viam, quæ ad tranquillitatem ducit, id inter minus frequentia habendum est; et quæ, ut ait Tacitus, interventu meliorum pensantur. Leges autem satis habent id quod ple-

Hist. iv. 74.

<sup>d</sup> *Tranquillitas publica*] Bene Chrysostomus: συνεργός ἐστὶ σοι, συμπράττει σοι. Princeps nimirum evangelium predicanti. Dedolat ille quod tu descobinas.

<sup>e</sup> *Sint quibus imperes*] Dictum hoc Sullæ aiunt Plutarchus, (in *Vit. Syll.* p. 472) Florus, 3, 2 et alii, unde sumsit Augustinus Lib. III. cap. 28. *de Civitate Dei*.

<sup>f</sup> Legitur in Pirke Aboth, cap. iii. pag. 42, *Ed. Fagii* 1541. *J. B.*

<sup>g</sup> *Sed et vorantes alios alii*] Est hoc

de statuis sexto: (Tom. vi. pag. 502. *Edit. Savil.*) sed et hoc: εἰάν γάρ τὰ δικαστήρια ἀνέλῃς, πᾶσαν τῆς ζωῆς ἡμῶν ἀνείλες τὸν εὐταξίαν. Tolle tribunalia, et omnem de vita tranquillitatem abstuleris. Deinde: [In dicta Orat. hæc non exstant.] μὴ γάρ μοι τοῦτο εἴποις, εἴτις κακῶς τῷ πράγματι κέχρηκεν, ἀλλ' αὐτῆς βλέπει τῆς διατάξεως τὴν εὐκοσμίαν, καὶ τὴν πολλὴν ὄψει τοῦ ταῦτα ἐξ ἀρχῆς νομοθετήσαντος σοφίαν. *Nec mihi illos refer, qui male usi sunt honoribus sed*

that these injuries also are for our good, because our endurance of them will not lose its reward. To me it appears that the Apostle considered the general end which is proposed in such order, namely, the public tranquillity, in which that of individuals is comprehended. And it cannot be doubted that, for the most part, we gain this good by the public powers; for they further the happiness of the subjects for the sake of their own happiness. Hence the wish, *May there be those whom you may rule* [as Furfidius says to Sulla, Florus 3, 21]. It is a Hebrew proverb that *If there were no public power, one man would swallow another alive*: of which also Chrysostom gives the sense.

3 If the Rulers at any time are misled by excessive fear or anger, or other passions, so as to deviate from the road that leads to tran-

rumque accidit respicere, ut aiebat Theophrastus, quo et illud L. τὸ γὰρ, & D. de Legibus iii. in fine D. et pars. herod. Liv. xxxiv. 3.

Catonis pertinet: *Nulla lex satis commoda omnibus est: id modo quæritur, si majori parti et in summam prodest.* Quæ autem rarius contingunt, communibus tamen regulis constringenda sunt, quia etsi ratio legis in isto speciali facto specialiter locum non habeat, manet tamen ratio in sua generalitate, cui specialia subjici fas est. Id enim satius quam sine norma vivere, aut normam cujusque arbitrio permitti. Seneca apposite ad hanc rem: *Satius erat a paucis etiam justam excusationem non accipi, quam ab omnibus aliquam tentari.* Lib. vii. de Benef. 16.

4 Locum et hic habere debet illa nunquam satis memorato Periclis *apud Thucydidem sententia: Sic existimo, etiam singulis hominibus plus eam prodesse civitatem, quæ tota recte se habeat, quam si qua privatis floreat utilitatibus, ipsa autem universim laboret: qui enim domesticas fortunas bene collocatas habet, patria tamen eversa, pereat et ipse necesse est: Contra vero, etiam si quis in beata republica parum felix est, multo tamen facilius per illam in-* Lib. II. § 60.

*ipsius instituti vide pulchritudinem, et sapientiam ejus admiraberis, qui primus ejus auctor fuit. Idem ad Romanos (cap. viii. vers. 6, pag. 191. Tom. III.):* κἀν ἀέλης αὐτὰς (τὰς ἀρχὰς) πάντα οἰχθήσεται· καὶ οὐ πόλεις, καὶ οὐ χωρία, οὐκ οἰκία, οὐκ ἀγορὰ, οὐκ ἄλλο οὐδὲν στήσεται, ἀλλὰ πάντα ἀνατραπήσεται τῶν δυνατῶν τοῦς δεσποστέρους καταπιόντων. *Magistratus si abstuleris, perierint omnia, non urbes stabunt, non agri, non forum, nec quicquam aliud: evertentur omnia,*

*et fortioris esca fiet quilibet infirmior: idem sensus apud eundem ad Ephes. v. (Tom. III. pag. 862).*

§ *Apud Thucydidem sententia*] Lib. II. quicum bene convenit illud Ambrosii libro III. *de Officiis* (cap. 4): *Eadem singulorum est utilitas, quæ universorum.* Et illud in jure: *Semper non quod privatim interest unius ex sociis servari solet, sed quod societati expedit.* L. actiones. § Labeo. 65. § 5 v. Pro Socio. Adde L. unicam. § penul. c. de Caducis tollendis.

quillity, this is to be held as the less usual case, and compensated by the alternation of better times. And Laws are content to respect what commonly happens; as Theophrastus and Cato remark. [See.] Exceptional cases must submit to the general rule; for though the reason of the rule does not specially hold in that special case, yet the general reason of the rule remains; and to this special facts must be subjected. This is better than living without a rule, or leaving the rule to every one's will. So Seneca. [See.]

4 To this effect is the memorable passage in the speech of Pericles, as stated by Thucydidēs. Livy expresses it more briefly. So Plato, Xenophon, Jamblichus. [See.]

*columis servatur. Quare cum civitas quidem singulorum possit sustentare calamitates, singuli autem publicas non item, quid est, cur non universim ipsi consulere, ipsamque tueri oporteat, nec id facere, quod vos facitis, dum quasi attoniti jactura rei familiaris, salutem proditis reipublicæ?*

Lib. xxvi. 36.

De Leg. ix.  
p. 875 A.

Quem sensum breviter ita explicat Livius: *Respublica incolumis et privatas res salvas facile præstat: publica pro-*

*dendo, tua nequicquam serves.* Plato dixerat legum iv. τὸ μὲν γὰρ κοινὸν συνδεῖ, τὸ δὲ ἴδιον διασπᾶ τὰς πόλεις· καὶ συμφέροι τῷ κοινῷ τε καὶ ἰδίῳ τοῖν ἀμφοῖν, ἢ τὸ κοινὸν τιθῆται καλῶς μᾶλλον ἢ τὸ ἴδιον· quod commune est, connectit civitates, quod singulorum, dissipat; quare et publice, et privatim utilius est, ut publica magis quam privata curentur. Xenophon vero: ὅστις ἐν πολέμῳ ὦν στασιάζει πρὸς τὸν ἄρχοντα, πρὸς τὴν ἑαυτοῦ σωτηρίαν στασιάζει· qui in bello contra ducem seditiose se gerit, facit hoc cum suæ salutis periculo. Eodem et illa Jamblichi pertinent: *Non dis-*

De Exped.  
Cyr. vi. 1.  
§ 19.

Apud Stob.  
Bern. 46. De  
Magist.

*juncta est privata utilitas a publica, imo in bono communi singulare etiam continetur: et ut in animalibus ceteraque natura, ita in civitatibus in totius salute salus est partium.*

5 In publicis autem præcipuum haud dubie est ordo ille, quem dixi, imperandi parentique; is vero cum privata resistendi licentia consistere nequit. Explicare libet hoc ipsum nobili Dionis Cassii loco: οὐ μὲν τοι καὶ ἐγὼ οὐτ' ἄλλως καλὸν εἶναι νομίζω ἄρχοντά τινα τῶν ἀρχομένων ἠττάσθαι, οὐτ' ἂν σωτήριον τι γενέσθαι ποτέ, εἰ τὸ ταχθὲν ὑπηρετεῖν τινί, κρατεῖν αὐτοῦ ἐπιχειρήσειε. σκέψασθε δὲ ποῖος μὲν κόσμος οἰκίας γένοιτο, ἂν οἱ ἐν τῇ ἡλικίᾳ ὄντες τῶν πρεσβυτέρων καταφρονήσωσι. ποῖος δὲ τῶν διδασκαλείων, ἂν οἱ φοιτῶντες τῶν παιδευτῶν ἀμελήσωσι. τίς ὑγίεια νοσοῦσιν, ἂν μὴ πάντα τοῖς ἰατροῖς οἱ κάμνοντες πειθαρχῶσι; τίς δ'

Lib. xli. p. 180.

<sup>b</sup> Hoc cedit vobis gratia apud Deum] Tertullianus de Patientia: Timor hominis, Dei honor est. [Cap. 7. Sed ibi de alia plane re agitur.]

<sup>c</sup> Præcepta illa generalia suas tamen habent exceptiones, ex natura ipsius

rei petitas. Fatetur id Auctor ipse de Servis, Lib. ii. cap. v. § 22. J. B.

<sup>d</sup> Ames parentem, si æquus est: si non, feras] Terentius Hecyra (Scen. III. Act. i. vers. 21):

Nam matris ferre injurias me, Parmeno, pietas jubet.

5 This public order of command and obedience is inconsistent with the private license of resisting. See Dio Cassius.

6 St Peter speaks to the same effect as St Paul. So the Clemen-

ἀσφάλεια ναυτιλλομένοις, ἂν οἱ ναῦται τῶν κυβερνητῶν ἀνηκουστώσι; φύσει τε γὰρ ἀναγκαῖα τινὰ καὶ σωτήρια τῷ μὲν ἄρχειν ἐν τοῖς ἀνθρώποις, τῷ δὲ ἄρχεσθαι τέτακται. *Ego vero neque decorum existimo, ut rector civitatis cedat, neque spem esse ad salutem, si quod parere positum est velit imperare. Cogitate enim quis futurus sit ordo in familia, si a junioribus senes spernantur: quis item in scholis, si a discipulis susque deque habeantur præceptores: unde sanitas ægrotantibus, si non per omnia medicis pareant: quid tuti navigantibus, si plebs nautica gubernantium jussa contemnat. Natura quippe id necessarium et hominibus salutare, ut alii quidem imperent, alii vero pareant.*

6 Paulo comitem addamus Petrum, cujus hæc sunt verba: *Regem honorate. Servi, subditi estote cum omni timore dominis, non solum bonis et æquis, sed etiam duris. Hoc enim cedit gratiæ, si quis propter conscientiam Dei suffert molestiam injuste afflictus: quæ enim gloria est, si peccantes et colaphis cæsi subsistitis? sed si bene agentes, et tamen male habitis subsistitis, hoc cedit vobis gratiæ apud Deum.* Confirmat mox hoc a Christi exemplo. Idemque sensus in Clementis constitutionibus his verbis exprimitur: ὁ δούλος εὐνοϊαν φερέτω πρὸς τὸν δεσπότην μετὰ φόβου Θεοῦ, καὶ ἀσεβῆς, καὶ πονηρὸς ὑπάρχη: *servus Deum timens simul bene hero suo velit, quamvis impio, quamvis injusto.* Notanda hic duo: quod dicitur subjectionem dominis deberi, etiam duris, <sup>6</sup>idem ad reges quoque referendum: nam quod sequitur ei fundamento superstructum, non minus subditorum quam servorum officium respicit. Ac deinde talem a nobis requiri subjectionem, quæ injuriarum patientiam secum ferat: sicut de parentibus dici solet:

<sup>1</sup>Ames parentem, si æquus est: si non, feras.

Et Eretriensis quidam adolescens, <sup>7</sup>qui Zenonis scholam diu

Cicero *pro Cluentio*: *Non modo reticere homines parentum injurias, sed etiam æquo animo ferre oportet.* (Cap. 6). Habet ad hoc præceptum pulchra Chrysostomus tum II. *ad Timotheum*, tum libro V. *adversus Judæos*. Perti-

nent huc et quæ Epictetus (cap. 65), et post eum Simplicius habent de duabus ansis.

<sup>7</sup> Refert id *Ælianus Var. Hist.* IX. 33. *J. B.*

*Publ. Syr.*  
v. 23.

tine Constitutions. We are taught that subjection is due to masters, even to the harsh; and the same is to be referred to kings; for the reason [in St Peter] holds equally good of kings. And we are taught

frequentaverat, quid ibi didicisset, rogatus respondit, ὀργὴν πατρὸς φέρειν, *iram patris ferre*. De Lysimacho Justinus: *Magno animo regis, velut parentis, contumeliam tulit*. Et apud Livium est: *Ut parentum sævitiam, sic patriæ, patiendo ac ferendo leniendam esse*. Apud Tacitum: *Ferenda regum ingenia*: et alibi: *bonos Imperatores voto expetendos, qualescumque tolerandos*. Apud Persas, laudante Claudiano [*In Eutrop. lib. II. vers. 479*]:

Quamvis crudelibus æquo

Paretur dominis.

V. 1 Nec ab hac lege Domini discedit <sup>k</sup>consuetudo veterum Christianorum, optima legis interpres. Nam quanquam pessimi sæpe homines imperium Romanum tenuerunt, nec defuerunt, qui obtentu adjuvandæ reipublicæ iis se opponerent, nunquam tamen eorum conatibus se adjunxerunt Christiani. In Clementis constitutionibus est, βασιλείᾳ οὐ θεμιτὸν ἐναντιστασθαι, *regiæ potestati resistere nefas*. Tertullianus Apologetico: *Unde Cassii, et Nigri, et Albini? unde qui inter duas lauros obsident Cæsarem? unde qui faucibus ejus exprimendis palæstricam exercent? unde qui armati palatium irrumpunt, omnibus tot<sup>1</sup> Sigeriis* (sic diserte habet manuscriptus, qui est apud omni laude ornatissimos juvenes Puteanos) *ac Partheniis audaciores? De Romanis, ni fallor, id est, de non Christianis*. De palæstrica, quod ait, ad Commodi mortem pertinet, peractam imperio præfecti prætorio

Cap. 35.

<sup>k</sup> *Consuetudo veterum Christianorum*] Ad quam pertinet canon XVIII. concilii Calcedonensis, repetitus canone IV. concilii in Trullo: concilium Tolertanum quartum: capitulum II. Caroli Calvi in villa Colonia. Synodus Suesionensis canone V.

<sup>1</sup> *Sigeriis*] Xiphilinus Domitiano: pag. 237 B. *Ed. Steph. ἐπέθεντο δὲ*

αὐτῶ καὶ συνεσκευάσαντο τὴν πρᾶξιμ Παρθένιος ὁ πρόκοιτος αὐτοῦ καὶ Σιγήριος (male Σίγηρος) ἐν τῇ προκοιτίᾳ καὶ αὐτὸς ὢν. *Insidias autem ei communicato inter se consilio struzere Parthenius, præpositus cubiculariorum, et Sigerius et ipse e cubiculariis*. Martialis libro IV. (*Epig. 79*):

Sigeriosque meros, Partheniosque sonas.

also that the subjection required of us includes endurance of evil. So of parents in Publius Syrus, Elian, Justin, Livy: of kings, in Tacitus, Claudian. [See.]

V. 1 The custom of the early Christians, the best interpreters of the law of our Lord, did not deviate from this rule. For though very wicked men held the Roman empire, and there were not wanting persons who opposed them on pretence of relieving the State, the Christians never took part in their attempts. And so the Clementine Consti-

Ælii Læti, manu palæstritæ; quo tamen Imperatore vix quisquam fuit sceleratior. Parthenius, cujus factum itidem detestatur Tertullianus, erat ille, qui pessimum Imperatorem Domitianum oppræsserat. His comparat Plautianum præfectum prætorio, qui Septimium Severum valde sanguinarium Imperatorem occidere in palatio voluerat. In eundem Septimium Severum arma, quasi pro reipublicæ caritate, sumserant in Syria Pescennius Niger, in Gallia et Britannia Clodius Albinus. Sed horum quoque factum Christianis displicuit, quod et ad Scapulam jactat Tertullianus: *Circa majestatem imperatoris infamamur: tamen nunquam Albiniani, vel Nigriani, vel Cassiani inveniri potuerunt Christiani.* Cassiani illi erant, qui secuti erant Avidium Cassium, virum egregium, qui in Syria sumtis armis causabatur Rempubicam se ire restitutum, quam M. Antonini negligentia perderet.

2 Ambrosius, cum injuriam non sibi tantum, sed et gregi suo, et Christo fieri crederet a Valentiniano, Valentiniani filio; populi satis concitati motu ad resistendum uti non voluit.

<sup>m</sup> *Coactus, inquit, repugnare non novi: dolere potero, potero flere, potero gemere: adversus arma, milites, Gothos quoque, lacrymæ meæ arma sunt: talia enim sunt munimenta sacerdotum: aliter nec debeo, nec possum resistere. Mox: Exigebatur a me, ut compescerem populum: referebam, in meo jure esse, ut non excitarem, in Dei manu, ut mitigaret.* Epist. v. Oral. in Aus. Epist. 32.  
Idem Ambrosius Maximi copiis adversus Imperatorem, et

Corruptum id nomen non hic modo in Tertulliano fuerat, sed adhuc est in Suetonio, (*Domit.* c. 17), ubi Saturius, et in Victore vulgari, ubi Casperius legitur: (*Epitom.* c. 12. num. 8).

■ *Coactus repugnare non novi*] Invenit Gratianus causa XXXIII. questione VIII. (Can. 21.) Idem Ambrosius, epistola XXXIII. *Vultis in vincula ra-*

*pere? voluntas est mihi: non ego me vallabo circumfusione populorum.* Imitatus est magnus Gregorius libro VII. epistola 1. *Si in morte Longobardorum me miscere voluissem, hodie Longobardorum gens nec regem, nec duces, nec comites haberet, atque in summa confusione esset divisa.*

tutions enjoin; and Tertullian boasts that the Christians had no share in the murder of the Roman Emperors. [See the passages.]

2 Ambrose, though fearing harm not only to himself but to his flock from Valentinian, would not use the excitement of the people as a means of resistance; as he says in his Epistles. [See.] The same Ambrose would not use the forces of Maximus against the Emperor, though both an Arian and an oppressor of the Church. So when Julian the Apostate was pursuing the most destructive counsels, he was



Theodoret.  
Hist. Eccles.  
v. 4.

Orat. i. in  
Julianum,  
p. 94 A.

Ibid. p. 80.

Tom. iv. p.  
386. Prop. 7A.

Arianum et Ecclesiæ gravem, uti noluit. Sic Julianum defec-  
torem cum pessima consilia agigaret, lacrymis Christianorum  
repressum, ait Nazianzenus, addens, *τὸν τοῦ μόνου ἐχόντων*  
*κατὰ διώκτου φάρμακον, quia solum hoc contra persecuto-*  
*rem erat remedium.* Atqui exercitus ejus ferme omnis ex  
Christianis constabat. Adde quod, ut observat idem Nazian-  
zenus, sævitia illa Juliani non tantum in Christianos erat in-  
juria, sed et rempublicam in summum adduxerat periculum.  
Accedat his illud Augustini, ubi illa Apostoli ad Romanos  
dicta explicat: *Necesse est propter hanc vitam nos subditos*  
*esse oportere, non resistentes si quid illi (rectores) auferre*  
*voluerint.*

VI. 1 Inveni sunt nostro sæculo viri eruditi quidem illi,  
sed temporibus et locis nimium servientes, qui sibi primum  
(ita enim credo) deinde aliis persuaderent, ea quæ jam dicta  
sunt, locum habere in privatis, <sup>a</sup>non etiam in magistratibus  
inferioribus, quibus jus esse putant resistendi injuriis ejus,  
cujus summum est imperium; imo et peccare eos, ni id faciant:  
quæ opinio admittenda non est. Nam sicut in dialecticis  
<sup>o</sup>species intermedia, si genus respicias, est species; si speciem  
infra positam, genus: ita magistratus illi, inferiorum quidem  
ratione habita, sunt publicæ personæ; at superiores si consi-  
derentur, privati sunt. Nam omnis facultas gubernandi, quæ  
est in magistratibus, summæ potestati ita subjicitur, ut quic-  
quid contra voluntatem summi imperantis faciant, id defectum  
sit ea facultate, ac proinde pro actu privato habendum. Lo-  
cum enim hic quoque habet, quod dicunt Philosophi, ordinem  
non dari, nisi cum relatione ad aliquid primum.

Aver. v. Mé-  
taph. com. 6.

<sup>a</sup> Non etiam in magistratibus infe-  
rioribus] Petrus Martyr ad Judicium  
III. Parsæus ad XIII. caput ad Roma-  
nos, Junius Brutus, Dansæus libro VI.

politicorum, et alii.

<sup>o</sup> Species intermedia] Genus spe-  
ciale Senecæ epistola LVIII.

p Ordo et ἐπαλληλισμός] Sic in

repressed only by the tears [not the arms] of the Christians. And yet  
his army consisted almost entirely of Christians. Add to this that  
Julian's cruelty was not only a wrong to the Christians, but brought  
the State into great danger. So Augustine.

VI. 1 Some learned men of our time, yielding too much to the  
influences of time and place, have persuaded first themselves (for so I  
believe) and then others, that this, though true of private persons, is  
not true of inferior magistrates; that they have a right of resistance,  
and ought to use it; which opinion is not to be admitted. For those

2 Ac mihi videntur, qui contra sentiunt, talem statum rerum inducere, qualem antiqui fabulabantur in celo fuisse, antequam majestas oriretur, quo tempore aiunt minores Deos Jovi non concessisse. At is quem dixi <sup>P</sup>ordo, et ὑπαλλήλισμός, non tantum sensu communi cognoscitur: unde illud [Senec. *Thyest.* vers. 612]:

Omne sub regno graviore regnum est.

Et Papinii illud [III. *Sylv.* 3. vers. 49, 50]:

Vice cuncta reguntur:

Alternisque regunt.

Et <sup>q</sup>Augustini dictum celebre: *Ipsos humanarum rerum gradus adverte: si aliquid jusserit curator, faciendum: non tamen, si contra proconsul jubeat: aut si consul aliquid jubeat, et aliud Imperator: non utique contemnis potestatem, sed eligis majori servire: nec hinc debet minor irasci, si major prælatus est.* Et hoc ejusdem de Pilato: *Talem quippe Deus dederat illi potestatem, ut esset etiam ipse sub Cæsaris potestate.*

c. qui Resist. 17. Caus. xl. qu. 3.

Ad Joh. Tom. ix. p. 369.

3 Sed et divina probatur auctoritate. Nam Apostolorum princeps subjectos nos esse vult aliter regi, aliter magistratibus: regi, ut supereminenti, id est, sine ulla exceptione, præter ea quæ Deus directe imperat, qui injuriæ patientiam probat, non interdicit: magistratibus, tanquam missis a rege, id est potestatem suam a rege ducentibus. Et cum Paulus omnem animam supremis potestatibus esse subjectam vult, etiam magistratus inferiores inclusit. Neque in populo Hebræo, ubi tot fuere reges divini humanique juris contemtores,

1 Ep. Petr. ii. 13.

Rom. xiii. 1.

familia paterfamilias primus, inde materfamilias, inde filii, mox ordinarii servi, postremo servi vicarii. Vide Chrysostomum 1. ad Corinth. xiii. 3.

<sup>q</sup> Augustini] Habet prope eadem Augustinus sermone vi. in *Verba Domini*.

inferior magistrates, though public persons with regard to their inferiors, are private persons with regard to their superiors. All authority is subject to the Sovereign authority; and what is not done by that authority is a private act. [See the Scholastic reasons.]

2 The state of things thus defended is like that fabled in heaven, when the minor Deities rebelled against Jove. The subordination of all to the Supreme Power is recognized by common sense; in Seneca; Papinius; Augustine. [See.]

3 And also by Divine Authority; expressed by Peter, Paul, Samuel.

unquam inferiores magistratus, in quibus plurimi fuere viri pii et fortes, id sibi juris sumserunt, ut regibus vim ullam opponerent, nisi si qui a Deo, cujus in reges summum jus est, mandatum speciale acceperant: quin contra, quod procerum officium sit, ostendit Samuel, cum, proceribus et populo inspectante, Saulem jam perverse regnantem solita veneratione est prosequutus.

1 Sam. xv. 30.

4 Atque adeo religionis quoque publicæ status nunquam non a regis ac Synedrii arbitrio pependit. Quod enim post regem magistratus simul cum populo Deo se fideles fore promiserunt, id intelligi debet, quatenus in cujusque id futurum erat potestate. Ne simulacra quidem falsorum Deorum, quæ publice exstabant, dejecta unquam legimus, nisi jussu aut populi in libera republica, aut regum cum regnabantur. Quod si quid aliquando factum est vi contra reges, narratur in testimonium divinæ providentiæ id permittentis, non in facti humani approbationem.

5 Solet a contrariæ sententiæ auctoribus proferri dictum Trajani, cum pugionem præfecto prætorio traderet: <sup>8</sup> *Hoc pro me utere, si recte impero; si male, contra me.* Sed sciendum est, Trajanum, ut ex Plinii *Panegyrico* apparet, id unice curasse, ne quid regium ostentaret, sed <sup>1</sup> verum princi-

<sup>8</sup> Refertur a Xiphilino, pag. 248 D. *Ed. Steph.* Vide et Plinii Junioris *Panegyric.* c. 67. et Cassiodor. *Var.* VIII. 13. *J. B.*

<sup>1</sup> *Verum principem gerere*] Quod postea imitati Pertinax et Macrinus: quorum orationes egregias apud Hero-

dianum vide. (Lib. II. cap. 3; Lib. IV. cap. 14. *Edit. Bæcler.*)

<sup>9</sup> Vide JOSEPH. *Antiq. Jud.* Lib. XIV. cap. iv. § 2. *Ed. Hudson.* et Clariss. CLERICUM, in *Marc.* iii. 4. *J. B.*

<sup>10</sup> *Σαφῶς ὑπὲρ ψυχῆς θέομεν*] Macabæorum, Lib. I. c. 9. 10. 43. et 44. *καὶ*

4 And so also the state of public religion depends on the will of the King and the Council. (Synedrium.) The engagement of the magistrates and the people to be faithful to God, after the king, is to be understood, as far as is in their power. We do not read of the images of false gods being thrown down, except by command either of kings, or of the people when free. When this is done by force against the consent of the kings, it is related as a testimony of Divine Providence so permitting; not in approval of the human act.

5 On the contrary is urged Trajan's saying when he gave the dagger to the Prætorian Prefect: *Use it for me if I rule rightly; if ill, against me.* But Trajan wished to avoid assuming kingly authority, and to be a true Governor (Princeps), and as such was subject to the will of the Senate and people; whose commands the Prefect was to

pem gereret, qui proinde subesset sanatus populi que judicio; quorum sententias exsequi præfectus deberet etiam in ipsum principem. Simile est, quod de M. Antonino legimus, qui publicam pecuniam attingere noluit, nisi consulto senatu.

Xiphilin. in  
Jus VII. p.  
281.

VII. 1 Gravior illa est quæstio, an lex de non resistendo nos obliget in gravissimo et certissimo discrimine. Nam leges etiam Dei quædam, quamquam generaliter prolatae, tacitam habent exceptionem summæ necessitatis: quod de lege sabbati <sup>9</sup>Hasamonæorum temporibus a sapientibus definitum fuit: unde dictum celebre: *periculum animæ impellit sabbatum*: et Judæus apud Synesium causam neglectæ legis de sabbato hanc reddit: *σαφῶς ὑπὲρ ψυχῆς θέομεν, in certissimum vitæ periculum adducti sumus*. Quæ exceptio probata est ipsi Christo: ut et in lege altera de non edendis panibus propositionis. Et Hebræorum magistri legibus de cibis vetitis, aliisque nonnullis, ex veteri traditione eandem addunt exceptionem, recte quidem: non quod Deo jus non sit ad certam mortem subeundam nos obstringere, sed quod leges quædam ejus sint argumenti, ut non credibile sit datas ex tam rigida voluntate: quod in legibus humanis magis etiam procedit.

2 Non nego a lege etiam humana quosdam virtutis actus posse præcipi, sub certo mortis periculo, ut <sup>1</sup>de statione non

ἤκουσε Βακχίδης καὶ ἦλθε τῇ ἡμέρᾳ τῶν σαββάτων ἕως τῶν κρηπίδων τοῦ Ἰορδάνου ἐν δυνάμει πολλῆ. καὶ εἶπεν Ἰωναθὰν τοῖς παρ' αὐτοῦ ἀναστῶμεν ἕνθα πολεμήσωμεν ὑπὲρ τῶν ψυχῶν ἡμῶν οὐ γὰρ ἐστὶ σήμερον ὡς ἐχθὲς καὶ τρίτην ἡμέραν. *Id cum audisset*

*Bacchides, venit multo cum exercitu ad Jordanis ripas ipso die sabbati. Jonathan autem suis dixit: Surgamus nunc, et pro vita pugnemus; neque enim nostræ res se habent ut heri et nudius tertius.*

<sup>1</sup> *De statione non deserenda]* Vide Josephum ubi de custodibus Saulis agit.

execute, even against the Prince. So M. Antoninus would not touch the public money without consent of the Senate.

VII. 1 Whether in a very grave and certain danger the rule of non-resistance holds, is a more difficult question. For the laws of God may admit of exemption in cases of extreme necessity. So the Hebrew law of the Sabbath did; and this exception is approved by Christ; as also in the case of the shew-bread. And so other laws of the Hebrews did. Not that God has not the Right of our obedience under certain death; but that some laws are of such a nature that it is not credible that they were given with so rigid an intention: still more in human laws.

2 Yet even human laws may command some acts of virtue with certain danger of death; as the military rule of not quitting our post.

deserenda; sed nec temere ea voluntas legem condentis fuisse intelligitur, neque videntur homines in se et alios tantum jus accepisse, nisi quatenus summa necessitas id exigat. Ferri enim leges ab hominibus solent et debent cum sensu humanæ imbecillitatis. Hæc autem lex, de qua agimus, pendere videtur a voluntate eorum, qui se primum in societatem civilem conso- ciant, a quibus jus porro ad imperantes manat. Hi vero si interrogarentur, an velint omnibus hoc onus imponere, ut mori præoptent quam ullo casu vim superiorum armis arcere, nescio an velle se sint responsuri, nisi forte cum hoc additamento, si resisti nequeat, nisi cum maxima reipublicæ perturbatione, aut exitio plurimorum innocentium. Quod enim tali circumstantia caritas commendaret, id in legem quoque humanam deduci posse non dubito.

3 Dicat aliquis, rigidam illam obligationem, mortem potius ferendi, quam ullam unquam superiorum injuriam repellendi, non ex lege humana, sed divina proficisci. Sed notandum est, primo homines non Dei præcepto, sed sponte adductos experimento infirmitatis familiarum segregum adversus violentiam, in societatem civilem coïsse, unde ortum habet potestas civilis, quam ideo humanam ordinationem Petrus vocat: quanquam alibi et divina ordinatio vocatur, quia homi-

1 Pet. II. 13.

(*Ant. Jud. Lib. vi. cap. 13, § 9. Ed. Hudson.*) *θάνατος ἢν πρόστιμον τῆς ἐφεδρείας*  
*Πολύβιος: παρά Ῥωμαίους λιπόντι τὴν τάξιν.* [Habet e Suida,

But this is not lightly to be supposed the intention of the lawgiver; nor do men appear to have accepted it so, unless extreme necessity require. For laws are and ought to be made, with a sense of human weakness. The law of which we speak (that of non-resistance) seems to depend on those who first formed civil society, and from whom the Rights of Rulers are derived. And if these could be asked whether they would impose on all this burthen, that they should prefer to die rather than in any case resist a superior by force, it is probable they would answer that they would not: unless perhaps with this addition; except resistance would involve extreme disturbance of the State, and the death of many innocent persons. And what benevolence would recommend in such circumstances, we may confidently ascribe to human law.

3 It may be said that the rigid obligation of bearing death rather than resisting a superior, proceeds not from human, but from Divine Law. But it is to be noted that Civil Society is the result, not of Divine precept, but of the experience of the weakness of separate families to protect themselves; and is thus called by Peter an ordi-

num salubre institutum Deus probavit. Deus autem humanam legem probans censetur probare ut humanam et humano modo.

4 Barclaius regii imperii assertor fortissimus huc tamen descendit, ut populo et insigni ejus parti jus concedat se tuendi adversus immanem sævitiam; cum tamen ipse fateatur totum populum regi subditum esse. Ego facile intelligo, quo pluris est id quod conservatur, eo majorem esse æquitatem, quæ adversus legis verba exceptionem porrigat: attamen indiscriminatim damnare aut singulos aut partem populi minorem, quæ ultimo necessitatis præsidio sic utatur, ut interim et communis boni respectum non deserat, vix ausim. Nam David, qui extra pauca facta testimonium habet vitæ secundum leges exactæ, armatos circum se primum quadringentos, deinde plures aliquanto habuit; quo nisi ad vim arcendam si inferretur? Sed simul illud notandum est, non factum id a Davide, nisi postquam et Jonathanis indicio, et pluribus aliis certissimis argumentis compererat Saulem vitæ suæ imminere. Deinde vero nec urbes invadit, nec pugnandi captat occasiones, sed latebras quærit, modo in locis deviis, modo apud populos externos, et hac religione ut popularibus suis nunquam noceat.

Lib. iii. *adv.*  
Monarch. c. 8.  
Lib. vi. cc. 33,  
34.

1 Sam. xxii.  
2. et xxiii. 13.

voce *πρόστιμα*: nam verba paullo alter leguntur apud ipsum Historicum, Lib. i. cap. 17. J. B.]

*nance of man*, though it is also an ordinance of God, because he approves it. And God, approving a human law, must be conceived approving it as human, and in a human manner.

4 Barclay, the most strenuous assertor of royal authority, yet allows that the people, or a *considerable part* of it, has the Right of protecting itself against extreme cruelty, though he asserts the whole people to be subject to the king. I can understand, that in proportion as what is preserved [by the rule of non-resistance] is more valuable, so much the more serious a matter is the equitable construction, which allows an exception to the words of the law. But still, I do not venture indiscriminately to condemn, either *individuals* or a *minority* of the people who thus have recourse to the ultimate means of necessity, provided they do not desert a respect for the common good. So David gathered the discontented to him, and had above four hundred armed men, of course, to repel violence. But this was not till David knew that Saul sought his life. And he did not seize upon cities, but hid himself in desert places or in foreign countries, avoiding to do harm to those of his nation.

5 Simile videri potest factum Maccabæorum: nam quod quidam hæc arma eo titulo defendunt, quasi Antiochus non rex, sed invasor fuerit, vanum puto: cum nusquam in omni historia Maccabæi, et qui eorum partes sequebantur, Antiochum alio quam regis nomine compellent; et merito sane, cum jampridem Macedonum imperia agnovissent Hebræi, in quorum jus Antiochus successerat. Nam quod lex vetat alienigenam populo præfici, de voluntaria electione intelligendum est, non de eo, quod temporum necessitate adductus populus facere cogebatur. Quod vero aiunt alii, usos Maccabæos jure populi, cui *αὐτονομία* deberetur, ne id quidem firmum. Nam Judæi primum a Nabuchodonosore devicti jure belli ex eodem jure successoribus Chaldæorum Medis et Persis paruerant: quorum "totum imperium ad Macedonas devenit. Hinc Judæi Tacito vocantur, *Dum Assyrios penes Medosque et Persas oriens fuit, vilissima pars servientium*. Nec quicquam ab Alexandro ejusque successoribus stipulati sunt, sed sine ulla conditione in eorum ditionem venerunt, sicut ante sub ditione Darii fuerant. Quod si et Judæi interdum ritus suos et leges palam exercere permisi sunt, id fuit ex regum beneficio jus precarium, non ex lege aliqua imperio addita. Nihil ergo est quod Maccabæos tueatur præter summum cer-

Hist. v. 2.

" Totum imperium ad Macedonas devenit] Justinus, libro xxxvi. Primus Xerxes rex Persarum Judæos domuit postea cum ipsis Persis in ditionem Alexandri magni venerit, diuque in potestate Macedonici imperii subjecti Syria regno fuere. A Demetrio cum descivissent, amicitia Romanorum petita, primi omnium ex orientalibus libertatem receperunt, facile tunc Romanis de alieno largientibus. (Cap. 3.)

<sup>1</sup> Non ita falluntur. Dicemus in Notis Gallicis ad hunc locum. J. B.

<sup>2</sup> Principi in populo tuo non maledices] Joabus Semelis apud Josephum: οὐ τεθνῆξῃ βλασφημήσας τὸν ὑπὸ τοῦ Θεοῦ κατασταθέντα βασιλεύειν; Ἄν non morereris, qui ei maledicere ausus

es, quem Deus in regni sede constituit? [Ant. Jud. Lib. vii. cap. 11, § 2. Verum ibi qui loquitur, non est Joabus, sed frater ejus Abisais, Tserujæ filius. J. B.]

<sup>3</sup> Obstat plena divinatorum memoria mandatorum] Josephus de Davide: μετανοήσας δ' εὐθὺς, οὐ δίκαιον εἶπε φονεύειν τὸν ἑαυτοῦ δεσπότην. Sed statim pœnitentia ductus, injustum facinus esse dixit, dominum suum occidere. (Lib. vi. c. 13, § 4). Et post: Τὸν ὑπὸ τοῦ Θεοῦ χειροτονημένον βασιλέα δεινὸν ἀποκτείνειν κἄν ἢ ποιηρός· ἤξειν γὰρ αὐτῷ παρά τοῦ διδόντος τὴν δίκην. Horrendum, regem quamvis malum interficere: pœnant enim id facienti imminere ab eo qui regem dedit.

5 So the Maccabees were not justified by the general right of resistance; for Antiochus was king, and they had no legal right of resistance. They were justified by extreme danger.

6 And even in such a case, the person of the king is to be re-

tissimumque periculum : quamdiu scilicet intra sui defendendi terminos ita se continuerunt, ut in loca devia exemplo Davidis secederent, quærendæ securitati ; nec arma expedirent, nisi ultro oppugnati.

6 Illa interim cautio tenenda est, etiam in tali periculo personæ regis parcendum : quod qui factum a Davide putant non ex officii necessitate, sed ex sublimiore proposito, <sup>1</sup>falluntur. Ipse enim David aperte dixit, insontem neminem <sup>1 Sam. xxvi. 9.</sup> esse posse, qui manus regi inferret. Nimirum sciebat scriptum in lege : *Diis*, id est, iudicibus summis, *non maledices, et* <sup>Erod. xxii. 20.</sup> *principi in populo tuo non maledices* ; in qua lege mentio facta specialis eminentium potestatum, ostendit aliquid præcipi speciale. Quare Optatus Milevitanus de hoc Davidis facto <sup>Lib. II.</sup> loquens, <sup>2</sup>*Obstabat*, ait, *plena divinatorum memoria mandatorum*. Et verba Davidi hæc tribuit : *Volebam hostem vincere, sed prius est divina præcepta servare*.

7 At falsa maledicta ne in privatum quidem licet jacere ; in regem ergo veris quoque abstinendum ; quia, ut ait scriptor problematum, quæ Aristotelis nomen præferunt : *ὁ κακηγο-* <sup>§ 29. n. 14.</sup> *ρῶν τὸν ἄρχοντα, εἰς τὴν πόλιν ὑβρίζει*. *Qui rectori maledicit, in civitatem est injurius*. Quod si voce lædendus non est, manu certe multo minus : unde et pœnitentia tactum

[Ibid. § 9. *Edit. Huds.* In loco priore non omittit debuit Auctor hæc verba, *οὐδὲ τὸν ὑπὸ τοῦ Θεοῦ βασιλείας ἀξιοθέητα, eumque qui a Deo Rex constitutus est*. In loco altero versio ejus etiam male omittit hæc, *ὑπὸ τοῦ Θεοῦ κειραποτονημένον*, quæ idem significant, obstantque adeo, quominus de omnibus in universum Regibus locus intelligi queat. Quamvis et Doctissimus SALMASIUS, *Resp. ad Milton.* pag. 163. in *Versione* illius loci omittat illa verba, quæ tamen in Græco ponit ; quasi scilicet voce sola Regis continerentur. Sed pejus est, quod in fine, omissis quibusdam, sensus plane corruptus ab Auctore nostro, præ nimio forte studio causæ suæ serviendi. Ita habent Græca :

*Ἥξειν γὰρ αὐτῷ παρὰ τοῦ δόντος τὴν ἀρχὴν σὺν χρόνῳ τὴν δίκην, Venturam enim aliquando ipsi (Regi scilicet) pœnam, ab eo qui dedit illi imperium. J. B.]*

<sup>2</sup> *In civitatem est injurius*] Julianus *Misopogone* : *καὶ γὰρ οἱ νόμοι φοβεροὶ διὰ τοὺς ἄρχοντας, ὥστε ὕστis ἄρχοντα ὑβρίζει, ἐκ περιουσίας τοὺς νόμους καταπάτησεν*. *Sunt enim leges severæ pro principibus, ita ut qui in principem injuriosus fuerit, is ex animi libidine conculcaverit leges.* (Pag. 342 B. *Edit. Spanh.*) [Non satis adcurate vertitur hic locus. Id vult Imperator : *Metuuntur Leges Imperantes* (a quibus scilicet auctoritatem et vim omnem habent). *Qui igitur in ipsum Imperantem injurius est, multo audacius*

spected ; as was done by David.

7 Nor are those who resist to throw false reproaches on any one ; but on the king, not even true ones. Still more are they to abstain from laying hands on him. [See the heathen authorities.]



1Sam. xxiv. 6. Davidem legimus, quod vestem ejus violasset: tantam intelligebat personæ istius esse sanctitudinem! nec immerito: nam cum summum imperium <sup>a</sup> non possit non multorum odiis patere, securitas fungentis peculiariter fuit munienda. Quod Romani etiam in Tribunis plebis constituerunt, ut ἄσυλοι, id est, inviolabiles essent. Inter Essenorum dicta erat, reges

1Mac. v. 566. sanctos esse habendos: et insigne illud apud Homerum:

Περὶ γὰρ διέ ποιμένοι λαῶν,  
μή τι πάθοι.

<sup>b</sup> Nam pro populi pastore timebat,  
Nequid ei accideret.

Lib. x. 3. Nec immerito, ut apud Curtium est, *regium nomen gentes, quæ sub regibus sunt, pro Deo colunt*: <sup>c</sup> Artabanus Persa; ἡμῖν δὲ πολλῶν νόμων καὶ καλῶν ὄντων κάλλιστος οὗτός ἐστι, τὸ τιμῆν βασιλέα καὶ προσκυνεῖν, εἰκόνα Θεοῦ τὰ πάντα σώζοντας. Nobis inter leges multas easque bonas hæc optima est, regem colendum et adorandum, ut Dei cuncta sospitantis effigiem. Plutarchus Agide: οὐ θεμιτὸν οὐδὲ νενομισμένον βασιλέως σώματι τὰς χεῖρας προσφέρειν, nec fas nec licitum regis corpori manus inferre.

p. 304.

8 Illa quæstio gravior, an quantum Davidi, an quantum Maccabæis licuit, liceat et Christianis, quorum magister crucem subire toties jubens exactiorem patientiam videtur requirere. Certe ubi superiores ob religionem mortem intentant Christianis, Christus fugam concedit, his scilicet, quos

Matt. x. 23.

*Leges conculcabit.* Sic, ut cuius patet, locus ad rem nihil facit. J. B.]

<sup>a</sup> Non possit non multorum odiis patere] Quintilianus *Declamatione cccxlviii.* Hanc esse conditionem omnium, qui administrationem reipublicæ aggrediuntur, ut ea, quæ maxime pertinent ad salutem communem, cum quadam sui invidia efficere cogantur. Vide ea de re Livii verba ad Augustum apud Xiphilinum ex Dione. (Pag. 85, 86. Ed. H. Steph.)

<sup>b</sup> Nam pro populi pastore timebat] Bene Chrysostomus, 1 ad Tim. i. Si quis ovem jugulet, ab eo gregem immineat: at si quis pastorem de medio sustulerit, ab eo totum gregem dissipari. Seneca libro *Priore de Clementia*, cap. iii. Somnum ejus nocturnis excubiis muniunt: latera objecti circumfusique defendunt: incurrentibus periculis se opponunt. Non hic est sine ratione populis urbibusque consensus sic protegendi amandique reges, et se suaque jactandi, quocumque desi-

8 Whether what was lawful for David and for the Maccabees be lawful for Christians, is a graver question, since their Master, commanding them to bear their cross, seems to require a more exact patience. And certainly Christ counsels flight to Christians who are in danger of death, (that is, those who are not bound to their place

officii necessitudo nulli loco alligat: <sup>1</sup>ultra fugam nihil. Petrus vero Christum ait cum pateretur, nobis reliquisse exemplum quod sequamur, qui cum peccato vacaret, et doli omnis immunis esset, convitia convitiis non reposuit, neque inter patiendum minatus est, sed rem permisit juste judicanti. Idem gratias agendas Deo ait, et gaudendum Christianis, si tanquam Christiani pœnis subdantur. Et hac maxime patientia invaluisse Christianam religionem legimus.

9 Quare Christianis veteribus, qui recentes ab apostolorum et apostolicorum virorum disciplina eorum præscripta et intelligebant melius, et perfectius implebant, summam injuriam fieri puto ab iis, qui quo minus ipsi se defenderent in certissimo mortis periculo, vires putant illis, non animum deuisse. Imprudens certe et impudens fuisset Tertullianus, si apud Imperatores, qui ejus rei ignari esse non poterant, ita confidenter ausus esset mentiri: *Si enim hostes et apertos, non tantum vindices occultos agere vellemus, deesset nobis vis numerorum et copiarum? Plures nimirum Mauri et Marcomanni, ipsique Parthi, vel quantæcunque unius tamen loci et suorum finium gentes, quam totius orbis? Externi sumus, et vestra omnia implevimus, urbes, insulas, castella, municipia, conciliabula, castra ipsa, tribus, decurias, palatium, senatum, forum: sola vobis reliquimus templa. Cui bello non idonei, non prompti fuissemus, etiam copiis impares, qui tam libenter trucidamur, si non apud istam*

*deraverit imperantis salus. Nec hæc vilitas sui est aut dementia, pro uno capite tot millia excipere ferrum, ac multis mortibus unam animam redimere, nunquam senis et invalidi. Quemadmodum totum corpus animo deservit (quod ipsum late ibi exsequitur) sic hæc immensa multitudo unius animæ circumdata illius spiritu regitur, illius ratione flectitur, pressura se hac fractura viribus suis, nisi consilio sustineretur. Suam itaque incolumitatem amant, etc. Adde*

quæ infra, Lib. II. cap. 1, § ix.

<sup>c</sup> Artabanus Persa] Apud Plutarchum Themistocle. (Pag. 125 c.)

<sup>2</sup> Dicitum Christi unice pertinet ad Apostolos, ut patet ex sequentibus. Auctor ipse se refellit, quando in Adnotationibus ad hunc locum Matth. x. 23, verba illa solis Apostolis adcommodat, et inde fatetur non posse argumentum duci, ad definiendam questionem, An sponte fugere liceat, periculi tantum vitandi causa? J. B.

by duty,) but nothing beyond flight. So Peter says that Christ *has left us an example*, 1 Pet. ii. 21, and that we are to rejoice if we suffer as Christians, 1 Pet. iv. 12, 13, 14. And by such patience the Christian religion grew strong.

9 And so the ancient Christians teach: Tertullian; Cyprian; Lactantius; Augustine. [See the passages.]

*disciplinam magis occidi liceret quam occidere?* Sequitur hic quoque magistrum suum Cyprianus, et aperte prædicat: *Inde est, quod nemo nostrum, quando apprehenditur, reluctatur: nec se adversus injustam violentiam vestram, quamvis nimius et copiosus noster sit populus, ulciscitur. Patientes facit de secutura ultione securitas.* <sup>d</sup> *Innocentes nocentibus cedunt.* Et Lactantius: *Confidimus enim majestati ejus, qui tam contemptum sui possit ulcisci quam servorum suorum labores et injurias. Et ideo cum tam nefanda perpetimur, ne verbo quidem reluctamur: sed Deo remittimus ultionem.* Nec aliud spectavit Augustinus, cum dicit: *Nihil justus præcipue cogitet in his rebus, nisi ut bellum suscipiat, cui bellare fas est: non enim fas est omnibus.* Ejusdem est illud: *Quoties Imperatores in errore sunt, leges ad tuendum errorem contra veritatem condunt, per quas justis examinantur et coronantur.* Idem alibi: *Ita a plebibus principes et a servis domini ferendi sunt, ut sub exercitatione tolerantiae sustineantur temporalia, et sperentur æterna.* Quod veterum Christianorum exemplo alibi sic explicat: *Neque tunc civitas Christi, quamvis adhuc peregrinaretur in terris, et haberet tam magnorum agmina populorum adversus impios persecutores, pro temporali salute pugnavit, sed potius, ut obtineret æternam, non repugnavit. Ligabantur, includebantur, cædebantur, torquebantur, urebantur, laniabantur, trucidabantur, et multiplicabantur. Non erat eis pro salute pugnare, nisi salutem pro salute contemnere.*

10 Nec minus egregia sunt, quæ in eandem sententiam habet Cyrillus in locum Johannis de gladio Petri. Thebæa

<sup>d</sup> *Innocentes nocentibus cedunt*] Hæc sunt in scripto ad Demetrianum. Ejusdem hæc libri primi epistola 1. *Intellexit (adversarius) Christi milites vigilare, jam sobrios et armatos ad prælium stare, vinci non posse, mori posse; et hoc ipso invictos esse, quia nec mori timent, nec repugnare contra impugnantes, cum occidere innocentibus nec nocentem liceat, sed prompte et animas, et sangu-*

*nem tradere.* (Ep. 60. Ed. Fell.)

<sup>e</sup> At vero mera est fabula, quæcumque de illa Thebæa Legione dicuntur. Historia ipsa per se habet plurima indicia falsi: et libellus, in quo narratur, hoc titulo, *Passio Agaunensium Martyrum*, non est EUCHERII, Lugdunensis Episcopi, cui tribuitur, ut vel ex eo patet, quod Sigismundi, Burgundiæ Regis, Auctor meminere, qui Rex tamen sat

10 So Cyril holds concerning the sword of Peter. So the Theban legion did not resist when decimated for refusing to sacrifice.

legio, <sup>3</sup>ut acta nos docent, militibus constabat sexies mille sexcentis sexaginta sex Christianis omnibus: Qui, cum Maximianus Cæsar apud Octodurum exercitum compelleret sacra Diis falsis facere, primum Agaunum iter arripuerunt: et cum eo misisset Imperator, qui eos ad sacrificandum venire juberet, ipsique se id facturos negassent, Maximianus decimum quemque jussit interfici per apparitores, qui nemine repugnante facile imperium sunt exsecuti.

11 <sup>o</sup>Mauritius ejus legionis primicerius, a quo Agaunum vicus Mauriti dictus est postea, narrante Eucherio Episcopo Lugdunensi, eo tempore commilitones sic allocutus legitur: *Quam timui, ne quisquam, quod armatis facile est, specie defensionis, beatissimis funeribus manus obviam afferre tentaret! jam mihi ad hujus rei interdictum Christi nostri parabatur exemplum, qui exemptum vagina apostoli gladium propriæ vocis jussione recondidit: docens, majorem armis omnibus Christianæ confidentiæ esse virtutem, ne quisquam mortali operi mortalibus dexteris obsisteret, quin imo cæpti operis fidem perenni religione comperet.* Cum hoc supplicio peracto Imperator superstitibus eadem quæ ante præciperet, sic omnes respondent: *Milites quidem, Cæsar, tui sumus et ad defensionem reipublicæ Romanæ arma suscepimus: nec unquam aut desertores bellorum aut proditores militiæ fuimus, aut ignavæ formidinis meruimus subire flagitium. Tuis etiam obtemperaremus præceptis, nisi instituti legibus Christianis, dæmonum cultus et aras semper pollutas sanguine vitaremus. Comperimus præcepisse te, ut aut sacrilegiis pollueres Christianos, aut de denis interfectis nos velles terrere. Non inquiras longius latitantes:*

diu post mortem Eucherii regnavit. Hæc demonstravit Clar. JOANNES DUBOURDIEU, Dissertatione singulari, Anglice primum edita ann. 1696. postea Gallice, ut erat nata, Amstel. 1705. J. B.

<sup>o</sup> *Mauritius*] De hujus martyris honoribus apud Helvetios vide Guillimanum. (Lib. I. c. 15 et II. 8.) In veteri scripto de translatione sancti Justini in novam Corbeiam: *Unde juxta*

*fidem Chronicorum sub atrocissima et incomparabili illa decima post Neronem persecutione passum eum colligimus: quæ et prioribus persecutionibus immemor, dum venerabilem multitudinem martyrum cælis mitteret, inter quos etiam præcipuum sancti Mauriti collegium, et innocentia speculum. De Thebæis martyribus Brunsvicum translatis vide Crantzium Saxonico VII. 16.*

11 [The speeches of Mauritius the captain of the Theban legion, and of the soldiers, are to the same effect.]

*Nos omnes Christianos esse cognosce : habebis potestati tuæ subdita omnium corpora : auctorem vero suum respicientes Christum animas non tenebis.*

12 Tum Exuperius legionis signifer sic eam allocutus ibidem narratur : *Tenere me, commilitones optimi, sæcularium quidem bellorum signa perspicitis ; sed non ad hæc arma provoco, non ad hæc bella animos vestros virtutemque compello. Aliud vobis genus eligendum est præliorum. Non per hos gladios potestis ad regna cælestia properare. Deinde Imperatori hæc nuntiari jubet: Non nos adversum te, Imperator, armavit ipso, quæ fortissima est in periculis, desperatio. <sup>†</sup>Tenemus ecce arma et non resistimus, quia mori magis quam vincere volumus, et innocentes interire, quam noxii vivere præoptamus. Et postea: Tela projicimus: exarmatas quidem dexteras satelles tuus, sed armatum fide catholica pectus inveniet.*

13 Sequitur post hæc Ianiena in non repugnantes, in cujus narratione hæc sunt Eucherii verba : *Ne justii punirentur, multitudo non obtinuit, cum inultum (male editur multorum) esse soleat, quod multitudo delinquet.* In veteri martyrologio res eadem sic narratur : *Cædebantur itaque passim gladiis non reclamantes, sed et depositis armis cervices persecutoribus, vel intectum corpus offerentes, non vel ipsa suorum multitudine, non armorum motione elati sunt, ut ferro conarentur asserere justitiæ causam, sed hoc solum*

<sup>†</sup> *Tenemus ecce arma et non resistimus*  
 Similia sunt illa Judæorum Alexandrinorum ad Flaccum [Immo ad Petronium, *De Legat. ad Caium*, p. 1025.] ἀσπλοὶ ἔσμεν, ὡς ὄρα· παραγενομένων δὲ αἰτιῶνται τινες ὡς πολεμίου. ἃ δὲ ἡ φύσις ἐκάστῳ προσένειμεν ἀμνητήρια μέρη χεῖρας, ἀπεστρόφαμεν, ἄνθα μηδὲν ἐργάσασθαι δύνανται, παρέχοντες αὐτῶν τὰ σώματα πρὸς εὐ-

σκόπου τοῖς θέλουσιν ἀποκτεῖναι βουλὰς, et quæ sequuntur. *Inermes sumus, ut vides, et tamen sunt qui nos tanquam hostes publicos hic criminantur. Etiam eas, quas ad nostri tutelam partes dedit natura, retro vertimus, ubi nihil habent quod agant : corpora præbemus nuda ac patientia ad impetum eorum, qui nos volent occidere.*

‡ Valens] Vide excerpta ex Johanne

12 [As also the speech of Exuperius their standard-bearer.]

13 Then the butchery followed. The old martyrology tells the story of their suffering without resisting.\*

14 Those who professed the *ἰσοῦσιον* (the Son of one substance with the Father) were put to death without resistance by Valens.

15 He who follows such examples, if he so lose his life, saves it, as Christ has declared.

\* But Barbeyrac says the story is 'mera fabula.'

*reminiscentes, se illum confiteri, qui nec reclamando ad occasionem ductus est, et tanquam agnus non aperuit os suum, ipsi quoque tanquam grex Dominicanarum ovium laniari se tanquam ab irruentibus lupis passi sunt.*

14 <sup>s</sup> Valens impie et crudeliter sæviit in eos, qui secundum sacras literas et Patrum traditionem τὸ ὁμοούσιον profitebantur, quorum quamvis maxima multitudo nunquam se armis tutata est.

15 Certe ubi patientia nobis præscribitur, sæpe adduci videmus, et a Thebæis militibus adductum jam audivimus Christi exemplum, ut nobis imitandum, cujus patientia ad mortem se extendit. Ac qui ita animam perdit, is vere eam <sup>1 F</sup> <sup>Mc</sup> <sup>Lw</sup> acquisivisse a Christo pronuntiatur. Diximus summum imperium tenentibus resisti jure non posse. Nunc quædam sunt, quæ lectorem monere debemus, ne putet in hanc legem delinquere eos, qui revera non delinquant.

VIII. Primum ergo, qui principes sub populo sunt, sive ab initio talem acceperunt potestatem, sive postea ita convenit, <sup>h</sup> ut Lacedæmone, si peccent in leges ac rempublicam, non tantum vi repelli possunt, sed, si opus sit, puniri morte: quod Pausaniæ regi Lacedæmoniorum contigit. Atque hujus generis cum fuerint vetustissima per Italiam regna, mirum non est, si post narrata crudelissima Mezentii facinora subjungat Virgilius (*Æn.* VIII. 495):

Ergo omnis <sup>1</sup> furiis surrexit Etruria justis:  
Regem ad supplicium præsentī morte repossunt.

Antiocheno, ex manuscripto libro viri æterna memoria dignissimi Nicolai Peirescii. (Pag. 846.)

<sup>h</sup> *Ut Lacedæmone*] Plutarchus Ly-sandro (pag. 450): οἱ Σπαρτιᾶται τῷ βασιλεῖ δίκην προσέγραψαν θανατικὴν, ἣν οὐχ ὑποστάς ἐκεῖνος εἰς Τεγέαν ἔφυγε: *Spartiatæ regem ad captivum judicium vocarant, quod ille declinans fugit Tegeam.* Idem Sulla (pag. 476): αὐτοὶ γέ τοι Σπαρτιᾶται βα-

σιλεύοντας ἐνίοις ἀφείλοντο τὴν δρχήν, ὡς οὐ βασιλικούς, ἀλλὰ φαύλους καὶ τὸ μηδὲν ὄντας. *Quibusdam regibus Spartiatæ regnum ademerunt ut ineptis regno, quippe abjectis nihilique hominibus.* De Agide injuste, sed damnato tamen, vide eundem Plutarchum. Mossyni regem inedia puniebant. *Mela* Lib. I. (cap. 19).

<sup>1</sup> *Furiis surrexit Etruria justis*] Et aruspex Etruscus in Mezentium insur-

VIII. But on this rule of non-resistance there are some remarks to be made.

First, those Rulers who are subject to the people, whether by original institution or by subsequent convention, if they transgress against the laws and the State, may not only be resisted, but put to death, as Pausanias at Lacedæmon. So Mezentius in Virgil is resisted.

IX. Secundo, si rex, aut alius quis imperium abdicavit, aut manifeste habet pro derelicto, in eum post id tempus omnia licent, quæ in privatum. Sed minime pro derelicto habere rem censendus est, qui eam tractat negligentius.

Lib. IV. 16.

X. Tertio, existimat Barclaius, si rex regnum alienet, aut alii subiciat, amitti ab eo regnum. Ego hic subsisto. Nam talis actus, si regnum electione aut successoria lege deferatur nullus est: quæ autem nulla sunt, nullum habent juris effectum. Unde et de usufructuario, cui regem talem similem diximus, verior mihi videtur jurisconsultorum sententia, si extraneo jus suum cedat, 'nihil eum agere. Et quod dicitur ad dominum proprietatis reverti usumfructum, intelligendum legitimo tempore. Si tamen rex reipsa etiam tradere regnum aut subicere molitur, quin ei resisti in hoc possit, non dubito. Aliud est enim, ut diximus, imperium; aliud habendi modus, qui ne mutetur, obstare potest populus: id enim sub imperio comprehensum non est: quo non male aptes illud Senecæ in re non dissimili; *Et si paren-*

*Inst. de Usufr.*  
§ 3. finitur.  
L. si Usufructus, 66.  
D. de Jure Dotium.

Lib. III.  
Controv. 9.

gentibus (Ibid. vers. 500):

Quos justus in hostem

Fert dolor.

<sup>4</sup> Bene quidem Jure novo, quo traditio ad alienationem sufficiebat: sed non Jure veteri, quo *Cessio in jure*, extraneo facta, omnino usumfructum tollebat. Vide Celeberrimi NOODTII

eximium tractatum *De Usufructu*, Lib. II. cap. x. J. B.

<sup>k</sup> *Si rex vers hostili animo in totius populi exitium feratur*] Pari de causa tribunus plebis qui sit, ipso jure desinere esse talem, ingeniose defendit Gracchus, cujus verba digna lectu apud Plutarchum (pag. 831, 832): Johannes Major

IX. Secondly, if the king or other ruler has abdicated his power, or manifestly regards it as *derelict*, lost to him, he may thenceforth be treated as a private person. But he is not to be regarded as possessing it as derelict, merely because he uses it negligently.

X. Thirdly, says Barclay, if the king alienates the kingdom or brings it into subjection to another, he forfeits it. At this I stop. Such an act, if the kingdom be elective or hereditary, is null; and an act which is null, cannot have any effect in law. I think that the law of the jurists concerning tenants for life, which tenants, as we have said, such kings resemble, is more applicable; namely, that if they transfer their right to another, the act has no effect. And when it is said that the tenant's interest reverts to the lord, it is to be understood that it does so at the legal time.

But if the king take measures to transfer or subject his kingdom to another, I do not doubt that he may be resisted in that design. The authority is one thing, the manner of holding it another; and the people may resist the latter being changed: for that is not compre-

*dum in omnibus patri, in eo non parendum quo efficitur, ne pater sit.*

XI. Quarto, ait idem Barclaius amitti regnum, <sup>k</sup>si rex vere hostili animo in totius populi exitium feratur: quod concedo: consistere enim simul non possunt voluntas imperandi et voluntas perdendi: quare qui se hostem populi totius profitetur, is eo ipso abdicat regnum: sed vix videtur id accidere posse in rege mentis compote, qui uni populo imperet. Quod si pluribus populis imperet, accidere potest, ut unius populi in gratiam alterum velit perditum, ut colonias ibi faciat.

XII. Quinto, si regnum committatur, sive ex felonia in eum, cujus feudum est, sive ex clausula posita in ipsa delatione imperii, ut, <sup>l</sup>si hoc aut hoc rex faciat, subditi omni obedientiæ vinculo solvantur, tunc quoque rex in privatam personam recidit.

XIII. Sexto, si rex partem habeat summi imperii, <sup>m</sup>partem alteram populus aut senatus, regi in partem non

in librum iv. Sententiarum dicit, non posse populum a se abdicare potestatem destituendi Principis in casu, quo ad destructionem vergeret: quod commodè explicata ex his, quæ hoc loco dicuntur.

<sup>l</sup> Si hoc aut hoc rex faciat] Vide de regno Arragoniæ Marianam libro viii.

<sup>m</sup> Partem alteram populus aut senatus] Exemplum habes in Genuate republica apud Bizarum libro xviii. in Bohemia tempore Wenceslai [apud Dubrav.] Historiæ libro x. Adde Azorium Institutionum Moralium libro x. cap. 8. et Lambertum Schafnaburgensem de Henrico IV.

hended in the authority. As Seneca says in a similar case; *We are to obey a father; but not in his wish to become not a father.*

XI. Fourthly, if the king act, with a really hostile mind, with a view to the destruction of the whole people, Barclay says that the kingdom is forfeited; for the purpose of governing and the purpose of destroying cannot subsist together: so that he who professes himself the enemy of the whole people, *ipso facto*, abdicates his kingdom. But this can hardly happen in a person of sound mind, who governs one people only. If he govern several peoples, he may wish to destroy one of them for the sake of another, that he may found colonies there.

XII. Fifthly, if the kingdom be bestowed by commission from a superior; and if the king either commit felony against the lord of the fief, or if there be a clause in the grant, that if the king do so and so, his subjects are released from the tie of obedience; then also the king falls back into a private person.

XIII. Sixthly, if the king have a part only of the Sovereignty,



suam involanti vis justa opponi poterit, quia eatenus imperium non habet. Quod locum habere censeo, etiamsi dictum sit, belli potestatem penes regem fore: id enim de bello externo intelligendum est: cum alioqui quisquis imperii summi partem habeat, non possit non jus habere eam partem tuendi: quod ubi fit, potest rex etiam suam imperii partem belli jure amittere.

XIV. Septimo, si in delatione imperii dictum sit, <sup>ut</sup> certo eventu resisti regi possit, etiamsi eo pacto pars imperii retenta censeri non possit, certe retenta est aliqua libertas naturalis, et exempta regio imperio. Potest autem qui jus suum alienat, id jus pactis imminuere.

XV. 1 Vidimus de eo, qui jus imperandi habet aut habuit. Restat ut de invasore imperii videamus, non postquam longa possessione aut pacto jus nactus est, sed quamdiu durat injuste possidendi causa. Et quidem dum possidet, actus imperii quos exercet, vim habere possunt obligandi, non ex ipsius jure, quod nullum est, sed ex eo quod omnino probabile sit eum qui jus imperandi habet, sive is est populus ipse, sive rex, sive senatus id malle, interim rata esse quæ imperat, quam legibus judicisque sublatis summam induci confu-

*Vic. de Potest. Civ. n. 23.*  
*Suarez de Legib. iii. 10.*  
*n. 9. Less. de Jur. et Jur. ii. 89. Dub. 5. n. 73.*

<sup>ut</sup> *Ut certo eventu resisti regi possit]* 10c iv. et libro cxxxiii. in anno c10  
 Exempla vide apud Thuanum Historiarum cxxxi. in narratione anni c10  
 10c v. utrumque de Hungaria: apud Mejerum narratione anni c10cccxxxix.

another part being in the Senate or the people, and if the king invade the part which is not his, he may justly be opposed by force, because in that part he has not authority. And this I conceive may be, although the law directs that the power of making war be in the king. For this must be understood of external war. And since each party has its portion of the Sovereignty, it must also have the right of defending that part. When this is the case, the king may lose his portion of the Sovereignty by the right of war.

XIV. Seventhly, if in conferring the royal authority, it be stated that in a certain event, the king may be resisted; although by that means there is not a part of the Sovereignty withheld, yet a certain natural liberty is retained by the subjects and exempted from the royal authority. He who alienates his right [as the people here does] may limit by compact the right so alienated.

XV. Next concerning Usurpers.

1 We speak now of an Usurper of the kingdom, not after he has by long possession or treaty acquired a Right, but so long as his possession remains illegitimate. And during such possession, the acts of

sionem. Improbatur Cicero Syllanas leges, ut crudeles in proscriptorum liberos, ne honores petere possent. Servandas tamen censuit, affirmans (ut nos docet Quintilianus) ita his legibus contineri statum civitatis, ut his solutis ipsa stare non posset. Florus de ejusdem Sullæ actis: *Lepidus acta tanti viri rescindere parabat, nec immerito, si tamen posset sine magna clade reipublicæ.* Et mox: *Expediebat œgræ quasi sauciaque reipublicæ requiescere quomodocumque, ne vulnera curatione ipsa rescinderentur.* Lib. II. 1.  
Lib. III. 23.

2 In his tamen, quæ ita necessaria non sunt, et pertinent ad raptorem in iniqua possessione firmandum, si sine gravi periculo potest non pareri, parendum non est. Sed an talem raptorem imperii vi dejicere, aut denique occidere liceat, quaeritur.

XVI. Ac primum, si bello injusto, et cui juris gentium requisita non adsint, imperium arripuerit, neque pactio ulla sequuta sit, aut fides illa data, sed sola vi retineatur possessio: videtur manere belli jus, ac proinde in eum licere, quod in hostem licet, qui a quolibet etiam privato jure potest interfici. *In reos majestatis, inquit Tertullianus, et publicos hostes omnis homo miles est.* Sic et adversus militiæ desertores, Apolog. 2.

in Brabantia et Flandria narratione anni cIo cccc lxxviii. in fœdere inter regem Galliæ et Carolum Burgundum.

Adde de Polonia, quæ habet Chytræus Saxoniorum xxiv. et de Hungaria Bonfinius Decadis iv. libro ix.

government which he exercises may have an obligatory force, not from his Right, which is null, but because it is probable that the legitimate governor would wish that it should be so, rather than that laws and tribunals should be abolished and confusion ensue. Cicero says that the laws of Sylla were highly cruel, yet he thought it necessary to preserve them. So also Florus judges.

2 But in matters which are not thus necessary, and which tend to strengthen the unjust possession of the Usurper, he is not to be obeyed, if he can be disobeyed without extreme danger.

XVI. But whether such an Usurper may be put down by [private] force, or put to death, is a question.

And first, if he have seized the kingdom by an unjust war, not legitimate according to the Law of nations, and no treaty has followed, it appears that the Right of War remains; and that everything is lawful against him which is lawful against an enemy, who may be slain even by a private person\*. *Against traitors and public ene-*

\* This is not the modern Law of War, which makes a distinction between *Combatants* and *Non-Combatants*. See *Elements of Morality*, vi. 1060.

C. Quando  
licet unicuique,  
Lib. II.

p. 570 c, d.  
Tom. II.

cunctis jus pro quiete communi exercendæ publicæ ultionis indultum est.

XVII. Idem cum Plutarcho, qui ita sentit libro de fato ad Pisonem, statuendum censeo, si ante invasionem lex publice exstiterit, quæ unicuique potestatem facit occidendi eum, qui hoc aut illud, quod in aspectum cadit, ausus fuerit; puta qui privatus satellitium sibi circumdederit, arcem invaserit: qui civem indemnatum, aut non legitimo iudicio necaverit: qui magistratus sine justis suffragiis creaverit. Tales leges multæ exstabant in Græciæ civitatibus, ubi proinde justa censenda fuit talium tyrannorum interfectio. Talis erat Athenis lex Solonis <sup>o</sup>renovata post reditum ex Piræeo in eos, qui statum popularem sustulissent, aut eo sublato honores gessissent. Ut et Romæ <sup>o</sup>lex Valeria, si quis injussu populi magistratum gereret: et lex consularis post decemvirale imperium, ne quis magistratum sine provocatione crearet: qui creasset, eum jus fasque esset occidi.

XVIII. Nec minus licebit invasorem imperii interficere, si diserta auctoritas accedat ejus, qui jus verum imperandi

<sup>o</sup> Reperitur lex illa apud ΑΝΔΟCΙ-  
ΔΕΜ, *Orat.* I. pag. 219, 220. *Edit. Ha-*  
*nov. J. B.*

<sup>o</sup> *Lex Valeria*] Plutarchus *Publi-*  
*cola* (pag. 110): ἀνευ κρίσεως κτεί-  
νειν τὸν βουλόμενον τυραννεῖν. *Ut in-*  
*judicatum occidere eum liceret qui domi-*  
*natum concupisceret.* Mox addit: εἴτις  
ἐπιχειροῖ τυραννεῖν Σδλων μὲν ἀλόγῃ  
τῆν δίκην ἐπιτίθησιν, ὁ δὲ Προβλικόλας  
καὶ πρὸ τῆς κρίσεως ἀνελεῖν δίδωσι.  
*Solon ei, qui dominatum invadit, depre-*  
*henso diem dici vult, ac Publicola etiam*

*ante iudicium talem permittit interfici.*  
[Pag. 103 B, c. Vide potius Dion Ha-  
licarnass. *Ant. Rom.* Lib. V. c. 19.]

<sup>o</sup> Favonius ille erat amicus Bruti, et  
dictum istud refertur a PLUTARCHO,  
*Vit. M. Brut.* pag. 989 A. *J. B.*

<sup>p</sup> *Tyrannum Nabidem relinquit*  
Quod Plutarchus in T. Quintii vita sic  
explicat: ὡς ἐώρα σὺν κακῷ μεγάλῃ  
τῶν ἄλλων Σπαρτιανῶν ἀπολούμενον  
τὸν τύραννον. *Cum videret, sine gravi*  
*aliorum Laconum malo non posse ty-*  
*rannum destrui.* (Pag. 376 E.) Non

*mies, says Tertullian, every man is a soldier.* So every one is allowed to do justice on those who desert the army.

XVII. The same may be true in virtue of a law, existing before the usurpation, which gave every one the right of killing him who did this or that before his eyes: for instance, surrounded himself with a body-guard, seized a fort, put a person to death without lawful judgment, made magistrates without the regular choice. Such laws existed at Athens and Rome.

XVIII. To kill the usurper will be lawful for one who has authority from the legitimate power: and along with such we must reckon the guardians of royal wards, as Jehoiada was to Joash, when they put down Athaliah, 2 Chron. xxiii.

habet, sive is rex est, sive senatus, sive populus. His annumerandi et regum puerorum tutores, qualis Joaso erat Joiada, <sup>2 Paral. xxiii.</sup> cum Athaliam regno depelleret.

XIX. 1 Extra hæc ut privato vi dejicere aut interficere liceat summi imperii invasorem, probare non possum: quia fieri potest, ut is, qui jus habet imperii, malit invasorem in possessione relinqui, quam periculosus et cruentis motibus occasionem dari, qui plerumque sequi solent iis violatis aut interfectis, qui validam habent factionem in populo, aut externos etiam amicos. Certe an rem in id periculum adduci velit rex aut senatus, aut populus, incertum est, quorum sine cognita voluntate vis justa esse non potest. <sup>6</sup>Favonius dicebat: *χειρὸν εἶναι μοναρχίας ἀνόμου πόλεμον ἐμφύλιον, pejus esse bellum civile dominatu illegitimo.* Et Cicero, *Mihi pax omnis cum civibus bello civili utilior videtur.* Aiebat T. Quintius <sup>Philipp. ii. 18.</sup> satus fuisse Lacedæmone <sup>Liv. xxxiv. 49.</sup> tyrannum Nabidem relinqui, cum aliter opprimi non posset quam ruina gravissima civitatis, in ipsa vindicta libertatis peritura. Nec alio spectat illud apud Aristophanem, leonem in civitate non alendum, si alitus sit, <sup>Ran. v. 1431.</sup> ferendum esse.

alienum est ab hac re quod Plutarchus refert Lycurgo, Laconem quandam cum legisset:

*Ἐναντίας ποτὶ τοῦς δε τυραννίδα χάλκεος Ἄρης*

*Ἐλας, ἑλιουόντος ὀ ἀμφὶ πύλας ἔπεισον.*

Hæc, dum Marte parant dominatum exstinguere, ævus,

Ante belluuntis mœnia Mars rapuit.

*Ἐσπερὶσσε, δικαίως τεθνήκοντι οἱ ἄνδρες. ἴδει γὰρ ἀφ᾽ ἑμεν ἔλαν αὐτὰν κατακαῆμεν. Merito viri illi perire: exspectare enim debuerant, ut ipse per*

*se dominatus conflagraret.* [Locus est pag. 52 E. Tom. 1. Ed. Weck. Sed sensum responsionis, male ab Interprete expressum, non melius, quamquam alio modo, noster heic reddidit. Vertendum fuerat: *Merito perierunt illi; quia oportebat totam eam tyrannidem igne absumi permittere, non autem exstinguere, et sic servare.* Vide PALMERII *Exercit. in opt. Auct. Græcos*, pag. 186. Sic locus contrarium innuit ejus, quod Auctor putat. J. B.]

XIX. 1 In other cases than these, I cannot grant that it is allowable to a private person to put down by force, or to put to death, the usurper of a kingdom: for it may be that the legitimate governor would rather that the usurper should be left in possession, than that occasion should be given to dangerous and bloody movements, which generally follow, when those are killed who have a strong faction in the people, or have friends in other nations. Whether the legitimate government would wish that peril to be incurred, is uncertain; and without knowing their will, force is not justified. Cicero said, *To me any peace with my fellow-citizens seems better than civil war.* So Favonius, T. Quintius, in Livy: so Aristophanes. [See.]

2 Profecto gravissima cum sit deliberatio, libertas an pax placeat, ut Tacitus loquitur: et difficillimum hoc σκέμμα πολιτικόν Ciceroni, εἰ τυραννουμένης τῆς πατρίδος παντὶ τρόπῳ τυραννίδος κατάλυσιν πειρατέον, κἄν μέλλῃ διὰ τούτο περὶ τῶν ὄλων ἢ πόλις κινδυνεύειν; An cum patria illegitimo imperio premittitur, omnimodo danda sit opera ejus demendi, etiamsi civitas eam ob rem in summum discrimen adducenda sit? non debent singuli, quod populi commune est, judicium ad se rapere. Illud vero plane iniquum:

<sup>1</sup> Detrahimus dominos urbi servire paratæ.

App. Civ. 1.  
p. 354.

Sicut Sylla, interrogatus quid ita armatus patriam peteret, respondit, ἐλευθερώσω ἀπὸ τῶν τυραννούντων, ut eam a tyrannis liberem.

Epist. Fam.  
1. Ep. 9.

3 Melius Plato epistola ad Perdiccam suadet, cujus verba Latine sic posuit Cicero: *Tantum contendere in republica, quantum probare tuis civibus possis: vim neque parenti, neque patriæ afferri oportere.* Qui sensus et apud Sallustium exstat: *Nam vi quidem regere patriam aut parentes, quanquam et possis, et delicta corrigas, tamen importunum est, cum præsertim omnes rerum mutationes cædem, fugam, aliaque hostilia portendant.* Unde non longe abit illud

Bell. Jug. 3.

p. 989 a.

Stallii apud Plutarchum in vita Bruti: τῷ σοφῷ καὶ νοῦν ἔχοντι διὰ φαύλους καὶ ἀνοήτους κινδυνεύειν καὶ ταραττεσθαι μὴ καθήκειν. æquum non esse, ut vir prudens ac sapiens improborum et desipientium causa in pericula, et turbas se conjiciat. Huc et Ambrosii illud non male referas: *Adjuvat hoc quoque ad profectum bonæ existimationis, si de potentis manibus eripias inopem, de morte damnatum eruas, quantum sine perturbatione fieri potest; ne videamur jactantiæ magis facere causa quam misericordiæ, et graviora inferre vulnera, dum levioribus mederi desideramus.* Tho-

De Offic. 11.  
21.

<sup>1</sup> Detrahimus dominos urbi servire μένου. Bello pretextum sumebat, liberare Græcos, libertatis non egentis. Plutarchus Catone Majoris de Antiocho Magno: ἐποιήσατο αἰτίαν τοῦτ' Ἑλληνας ἐλευθεροῦν, μηδὲν δεο- (Pag. 342 F.)

2 Whether liberty or peace be better, is a most difficult point; on which individuals ought not to assume the office of judges. [See Tacitus, Cicero, Lucan (l. 351), Sylla in Plutarch *de Genio Socrat.* p. 576.]

3 So Plato says we are not to do violence to our country, or to our parents. So Sallust, Plutarch, Ambrose, Thomas Aquinas.

mas seditiosam esse dicit interdum quamvis tyrannici regim-<sup>2,2 q. 42.</sup>  
nis destructionem. Art. 1.

4 Non debet movere nos in contrariam sententiam factum  
Aodis in Eglonem regem Moabitarum: nam aperte testatur  
sacra auctoritas, hunc a Deo ipso vindicem suscitatum, man-<sup>Jud. iii. 15.</sup>  
dato scilicet speciali. Neque vero constat hunc Moabitarum Nek. ix. 27.  
regem nullum jus imperandi ex pactione habuisse. Nam et in  
alios reges Deus per quos volebat ministros sua judicia exse-  
quebatur, ut per Jehun in Joramum. 2 Reg. ix.

XX. Maxime autem in re controversa judicium sibi  
privatus sumere non debet, sed possessionem sequi. Sic tri-  
butum solvi Cæsari Christus jubebat, <sup>1</sup>quia ejus imaginem Matt. xxii. 97.  
nummus præferbat, id est, quia in possessione erat imperii.

<sup>1</sup> Quia ejus imaginem nummus præ- sessionis. Vide in *Historia Genute*  
ferbat] Certissimum hoc indicium pos- Bizarum libro xviii.

---

4 The killing of Eglon king of Moab by Ehud, Judg. iii. 15, is  
no precedent; he had a special mandate from God. So God in  
other cases exercised his judgments, as by Jehu against Joram,  
2 Kings ix.

XX. As a general consideration, a private person should not  
assume the judgment of a controverted point, but follow possession.  
So Christ commanded tribute to be paid to Cæsar because his image  
was on the coin, that is, because he was in possession of the empire.

---

## CAPUT V.

### QUI BELLUM LICITE GERANT.

- I. *Belli causas effectrices alias esse principales in sua re :*      vos et subditos.  
IV. *Naturæ jure neminem a bello prohiberi.*  
II. *Aut adjuvantes in aliena :*  
III. *Alias instrumentales, ut ser-*

I. **U**T in aliis rebus, ita et in voluntatis actionibus tria esse solent efficientium genera, principales, adjuvantes, et instrumenta. Causa effectrix principalis in bello perumque est is, cujus res agitur : in privato privatus : in publico potestas publica, maxime summa. An et pro aliis nihil moventibus bellum moveri ab alio possit, alibi videbimus. Illud interim tenebimus, naturaliter quemque sui juris esse vindicem : ideo manus nobis datæ.

II. 1 Sed et alteri prodesse quæ possimus non licitum modo, sed et honestum est. Recte qui de officiis scripserunt, aiunt, nihil esse homini utilius homine altero. Sunt autem diversa hominum inter se vincula, quæ ad mutuam opem invitant : nam et cognati ad opem ferendam coeunt, et vicini inclamantur, et qui ejusdem civitatis sunt participes ; unde illud : *Porro Quirites, et quiritari.* Aristoteles dixit, oportere quemque aut pro se arma sumere, si injuriam acceperit,

Lib. vii. D.  
de Serv.  
Esport. D.D.  
ad Lib. vii.  
D. de Furt.  
Lib. v. C. de  
Jure Flact.  
Cic. II. de  
Offic. 3.

Rhet. ad  
Alex. 3.

<sup>a</sup> Solon] Verba hæc Plutarchus refert (Vit. Solon. p. 88 D) : τῶν πόλεων κάλλιστα οἰκεῖται ἐκείνη ἐν ᾗ τῶν ἀδικουμένων οὐχ ἦπτον οἱ μὴ ἀδι-

κούμενοι προβάλλονται καὶ κολάζουσι τοὺς ἀδικούντας. Civitatem illa felicissime colitur, in qua qui injuriam non sensere, ei non minus quam qui sensere

#### CHAPTER V. *Who may lawfully make war.*

I. As in other things, so in the actions of the will, there are commonly three kinds of efficient causes ; the principal, the auxiliary, and the instruments. The principal effective cause in war is commonly he whose interest is concerned ; in private war, a private person ; in public war, a public power, generally a sovereign power. Whether war may be made by another, for those who do not themselves stir in it, we shall see elsewhere. In the mean time we hold by this maxim ; that by Natural Law, every one is the vindicator of his own right : this is what hands were given for.

II. 1 But further : to help another when we can, is not only lawful but proper. Those who have written of Duties, rightly say that nothing

aut pro cognatis, aut pro benefactoribus, aut sociis injuria affectis auxilia ferre. Et <sup>a</sup>Solon docuerat beatas fore respublicas, in quibus alienas injurias quisque suas existimaret.

2 Sed ut cetera desint vincula, sufficit humanæ naturæ communio. Ab homine enim nihil humani alienum est. Menandri dictum est [Apud Stob. Tit. XLIII.]:

Injuriarum si improbis auctoribus  
Reponeremus ultionem singuli,  
Nobis putantes fieri quod fit alteri,  
Inter nos juncti conspiratis viribus,  
Non prævaleret innocentis impetus  
Audax malorum; qui custoditi undique  
Jussique pœnas quas merentur pendere,  
Aut nulli penitus essent, aut pauci admodum.

Bart. in l. vi  
rim. D. de  
Just. et Jure  
n. 7. 8. Jaz  
ibid. n. 29.  
Cast. ad Lib.  
1. § 4. eodem.  
Bart. ad l. he  
ster. D. de  
Capt. n. 8.  
Innoc. ad c.  
Sicut. de  
Jurjur. et  
in c. oim de  
Rest. Spo.  
n. 16.  
Panorm. n.  
18.  
Sylvest. in  
Verb. Bell.  
q. 8.

Democriti vero hoc: Ἰδικοιμένοισι τιμωρεῖν κατὰ δύναμιν  
χρῆ καὶ μὴ παρίεναι τὸ μὲν γὰρ τοιοῦτο δίκαιον καὶ ἀγα-  
θόν. *Injuria oppressos defendere pro viribus oportet, et non  
negligere: illud enim justum bonumque est. Quod sic ex-  
plicat Lactantius: Deus, qui ceteris animalibus sapientiam  
non dedit, naturalibus ea munimentis ab incursu et periculo  
tutiora generavit. Hominem vero quia nudum fragilemque  
formavit, ut eum sapientia potius instrueret, dedit ei præter  
cetera hunc pietatis affectum, ut homo hominem tueatur,  
diligat, foveat, contraque omnia pericula et accipiat, et  
præstet auxilium.*

Lib. vi. 10.

se opponunt, et injuriam ceptantes pu-  
nient. Huc et illud pertinet Rudens  
Plauti: *Prætorque injuriæ prius col-  
lum, quam ad vos perveniat.* (Act. III.

Scen. ii. vers. 12).

<sup>1</sup> Est etiam hoc apud STOBÆUM,  
Serm. XLVI. J. B.

is so useful to man as other men. But there are various ties of men to men, which invite them to mutual aid. Relatives in blood unite for mutual help, and neighbours are called upon for aid, and fellow-citizens. Hence the Roman cry in sudden distress, *Porro Quiritis, et quiritari. Up Romans, for Romans.* Aristotle says that every one ought to use arms for himself, if he has received an injury, or to help relatives, benefactors, allies who are injured. And Solon taught that a State was fortunate, in which every one thinks the injuries of others his own.

2 If other ties are wanting, the tie of a common human nature is sufficient. Nothing belonging to mankind is indifferent to man. So Menander, Democritus, Lactantius.



III. Instrumenta cum dicitur, non arma hic intelligimus, et si quæ sunt his similia, sed eos qui ita agunt sua voluntate, ut ea voluntas ab altera pendeat. Tale instrumentum est patri filius, pater quippe ejus naturaliter: tale et servus, quasi pater ex lege: <sup>2</sup>nam sicut pater non tantum pater est totum eadem relatione, qua totum est totum partis, sed hoc ipsum quod est totum est: ita possessio est aliqui ipsius possidentia. Democritus: <sup>3</sup>*οὐκ ἔστιν οἷς κέρει τοῦ σώματος χροῖ ἄλλοι πρὸς ἄλλοι* *Familias tanquam partibus corporis aliis ad aliud utere.* Quale autem in familia est servus, tale in republica est subditus, ac proinde instrumentum imperantis.

IV. Nec dubium quin naturaliter omnes subditi bello adhiberi possint, sed quondam specialis lex arceat, ut olim <sup>b</sup>Romæ servos, nunc passim <sup>c</sup>clericos: quæ tamen lex, ut omnes ejus generis, cum summæ necessitatis exceptione intelligenda est. Et hæc quidem generaliter de adiutoribus et subditis dicta sunt: nam quæ specialia sunt, suis locis tractabuntur.

<sup>2</sup> Ratio hæc, e veteris Philosophiæ placitis popularibus petita, et subtili præterea argumentatione facta, parum hominibus satisfaciet. Dicendum simpliciter, Filium aut Servum haberi pro Instrumento, quum ita agunt, aut agere creduntur, jussu Parentis aut Domini, ut abque eo non acturi fuissent ipsi sponte sua. Videri possunt, quæ de triplici genere Cassarum ad actum alienum concurrentium scripsimus in Notis ad ultimas Editiones Versionis nostræ Gallicæ libelli Pufendorfiani *De Officio Hom. et Civis*, Lib. I. cap. I, § 27. seu ultimo. *J. B.*

<sup>3</sup> Apud STORICH, SERV. XLII. *J. B.*

<sup>b</sup> Romæ servos] Servus ad IX. *Enchiridion*. (Vers. 547.)

<sup>c</sup> Clericos] Ac Levites olim extra belli munus, ut notatum Josepho: *Ant. Jud. Lib. III. cap. 12, § 4. Edit. Hulsæ.* De clericis vide Nicetam Chiosstæa libro VI; Caroli Calvi Capitulum in Sparnaco XXXVII; in Gratiano c. clericum. dist. I. et causa XXIII. questione VIII. Et canones quidem sic habent: sed quanto illi servati a Græcis quam a Latinis diligentius, vide Annam Comnenam. [Lib. X. cap. 8. § 7].

III. When we speak of Instruments, we do not here mean weapons or the like, but voluntary agents, whose will is moved by the will of another. Such an Instrument is a son to a father, a servant to a master: So Democritus. So a subject in a State is the instrument of the Ruler.

IV. By Natural Law all subjects may take part in war; but some are excluded by special law, as slaves formerly among the Romans, and clerical persons now. Which law, like all of that kind, is to be understood with an exception of extreme necessity.

And so much generally of auxiliaries and subjects: special considerations will be treated in their own place.

HUGONIS GROTII  
DE JURE BELLI AC PACIS.  
LIBER SECUNDUS.

CAPUT I.

DE BELLII CAUSIS, ET PRIMUM DE DEFENSIONE SUI  
ET RERUM.

- |  |  |
|--|--|
| <p>I. <i>Causas belli justificas quæ dicantur.</i></p> <p>II. <i>Eas oriri ex defensione, ex actione ejus, quod nostrum est, aut nobis debetur, aut ex poena.</i></p> <p>III. <i>Pro vita defendenda bellum esse licitum.</i></p> <p>IV. <i>Contra aggressorem solum.</i></p> <p>V. <i>In periculo præsentis et certo, non opinabili.</i></p> <p>VI. <i>Item pro integritate membrorum.</i></p> <p>VII. <i>Maxime pro pudicitia.</i></p> <p>VIII. <i>Licite omitti defensionem.</i></p> <p>IX. <i>Defensionem illicitam esse interdum adversus personam publicè valde utilem, ob legem dilectionis.</i></p> <p>X. <i>Interfectionem Christianis non esse licitam ad arcendam alapam, aut contumeliam</i></p> | <p><i>similem, aut ne fugiatur.</i></p> <p>XI. <i>Pro rebus defendendis interfectionem non esse illicitam jure naturæ.</i></p> <p>XII. <i>Quatenus ea permissa sit lege Mosis.</i></p> <p>XIII. <i>An et quatenus Evangelica lege permissa sit.</i></p> <p>XIV. <i>An lex civilis, interfici aliquem defensionis causa permittens, jus det, an solam impunitatem, cum distinctione explicatur.</i></p> <p>XV. <i>Quando licita esse possit singularis dimicatio.</i></p> <p>XVI. <i>De defensione in bello publico.</i></p> <p>XVII. <i>Eam non licitam ad imminuendam duntaxat potentiam vicini.</i></p> <p>XVIII. <i>Nec in eo, qui justam bello causam dedit.</i></p> |
|--|--|

I. 1 **V**ENIAMUS ad causas bellorum: justificas intelligo: nam sunt et aliæ quæ movent sub ratione utilis, distinctæ interdum ab iis quæ movent sub ratione justi: quas inter se, et a <sup>a</sup> belli principiis, quale erat cervus in bello

<sup>a</sup> *Belli principiis]* Exordia pugne dixit Virgilius. (*Æn.* VII. 40.)

CHAPTER I. *Of the Causes of War; and first of Self-defense, and Defense of our Property.*

I. 1 Let us come to the causes of war; I mean justificatory causes; for there are causes which operate on the ground of utility, distinct

*Hist.* III. 6, 7. Turni et Æneæ, accurate distinguit Polybius. At quamquam manifestum est harum rerum discrimen, voces tamen confundi solent. Nam quas causas dicimus justificas, etiam *Lib.* xlv. 22. principia dixit Livius in Rhodiorum oratione: *Certe quidem vos estis Romani, qui ideo felicia esse bella vestra, quia justa sint, præ vobis fertis, nec tam exitu eorum quod vincatis, quam principibus, quod non sine causa suscipiatis gloriamini.* Eodemque sensu ἀρχὰς πολέμου dixit Ælianus libro XII. capite 53, et Diodorus Siculus libro XIV. de bello agens Lacedæmoniorum in Eleos easdem vocat *ἑ* προφάσεις et ἀρχὰς.

*Biblioth.* p. 404.

2 Hæ justificæ causæ proprie nostri sunt argumenti, ad quas illud pertinet Coriolani apud Halicarnassensem: *πρώτων ὑμῖν παραινῶ σκοπεῖν, ὅπως εὐσεβῆ καὶ δίκαιαν πορίσηθε τοῦ πολέμου πρόφασιν: Id primum vobis curandum arbitror, ut riam et justam accipiatis belli causam.* Et hoc Demosthenis: *ὥσπερ οἰκίας, οἶμαι καὶ πλοίου, καὶ τῶν ἄλλων τῶν τοιούτων τὰ κάτωθεν ἰσχυρότατα εἶναι δεῖ, οὕτω καὶ πράξεων τὰς ἀρχὰς καὶ τὰς ὑποθέσεις ἀληθεῖς καὶ δίκαιάς εἶναι προσήκει.* *Sicut in domibus, et navigiis, rebusque similibus,*

*Lib.* viii. 8.

*Orat.* II. p. 6. 8.

*b* Vos estis Romani] Certe vix ulla gens tam diu constans mansit in spectandis belli causis. Polybius apud Suidam voce ἐμβάλλειν [ubi tamen non legitur nomen Historici, nec alterius, quisquis auctor est verborum illorum.] οἱ γὰρ Ῥωμαῖοι πρόνοιαν ἐποιοῦντο μηδέποτε πρότεροι τὰς χεῖρας ἐπιβάλλειν τοῖς πέλας· ἀλλ' εἰ δοκεῖ ἀμυνόμενοι ἐμβάλλειν εἰς τοὺς πολεμίους. [Apud Suidam est πολέμου.] Romani summopere id curarunt, ne priores ipsi finitimis inferrent violentas manus. Sed ut semper crederentur in hostem ire ad arcendas injurias. Ostendit id Dion [Immo Diodorus Siculus, pag. 314, 316, *Excerptorum* laudatorum] egregia com-

paratione Romanorum cum Philippo Macedone et Antiocho in excerptis Peirescianis. Ejusdem est illud in excerptis legationum: (*Ἐπιτοῖι Ὑρσῖνι*, ubi legitur: διὰ τὸ ἐὰν τοὺς παλαιούς οὐδὲν οὕτω σπουδάζειν, ὥς τε δίκαιους ἐφίστασθαι πολέμους. [Ubi videtur legendum, ἐνίστασθαι, ut in loco sequi.] Rursum in excerptis Peirescianis: σφόδρα οἱ Ῥωμαῖοι φιλοτιμοῦνται δίκαιους ἐνίστασθαι τοὺς πολέμους, καὶ μηδὲν εἰκῆ καὶ προπετῶς περὶ τῶν τοιούτων ψηφίζεσθαι. Valde id student Romani, justa ut bella suscipiant, nihilque tale discernant sine causa ac temere. (Pag. 341, quæ ex Diodoro etiam.)

*c* Προφάσεις] Δικαιώματα dixit

from those which depend on justice; and these again may be distinguished from occasional causes, or the first collision, as the stag in the war of Turnus and Æneas. These are sometimes confounded. [See Polybius, Livy, Elian, Diodorus.]

2 These justificatory causes are properly our subject. The necessity of just causes for war is acknowledged. [See Dionysius, Demosthenes, Dio Cassius, Cicero.]

*quæ substernuntur firmissima esse oportet, ita in actionibus causas ac fundamenta oportet justo ac vero congruere.*

Nec minus hoc Dionis Cassii: *δεῖ δὲ τοῦ δικαίου πᾶσαν ἡμᾶς* Lib. xll. p. 189 A.

*πρόνοιαν ποιείασθαι. μετὰ μὲν γὰρ τούτου καὶ ἡ παρὰ τῶν ὀπλων ἰσχύς εὐελπίς ἐστίν. ἀνευ δ' ἐκείνου βέβαιον οὐδὲν, καὶ παραντικά τις κατορθώσῃ τι, ἔχει· maxima nobis justitiæ habenda est ratio: quæ si adsit, vis bellica spem bonam præbet: sin absit, nihil quis certi habet, etiamsi prima ex sententia succedant.* Et illud Ciceronis: *illa*

*bella injusta sunt, quæ sunt sine causa suscepta: qui et* De Rep. II. [[Vide not. c.]]

*alibi Crassum reprehendit, quod Euphratem transire voluisset* De Finib. III. 22.  
*⁹nulla belli causa.*

3 Quod non minus de bellis publicis quam privatis verum est. Hinc illa Senecæ querela: *Homicidia compescimus et singulas cædes? quid bella et occisarum gentium gloriosum scelus? Non avaritia, non crudelitas modum novit. . . Ex senatusconsultis plebisque scitis sæva exercentur, et publice jubentur vetita privatim.* Habent quidem bella publica auctoritate suscepta aliquos effectus juris, ut et sententiæ: de quibus agendum infra erit: Sed non eo magis peccato vacant, Epist. xcv.

Procopius Gothicorum III. (cap. 33.) Adde quæ infra hoc libro capitis xxii. initio.

⁹ [Ἐπιθέσει] Sic et ἐπιθέσει belli dixit Julianus secundo de laudibus Constantii. (Pag. 95 B.)

⁹ [Nulla belli causa] Appianus (Bell. Civ. Lib. II. p. 438) eidem Crasso a Tribunis denuntiatum dicit μὴ πολεμεῖν τοῖς παρθυαλοῖς μηδὲν ἀδικοῦσιν· ne bellum Parthis inferret nulla injuria cognitis. Plutarchus de eodem: καὶ συνίστατο πολλοὶ χαλεπαίνοντες εἰτις ἀνθρώποις οὐδὲν ἀδικοῦσιν, ἀλλ' ἐνοσπύδοις πολεμίων ἀπεισι· Coibant multi indignantes, esse aliquem, qui bel-

latum iret in homines non modo nullius injuria compertos, sed et pace defensos. (Vit. M. Crass. pag. 552 E.) [Locus autem Ciceronis, qui hec præcedit, a Lib. III. de Rep. nullibi, puto, ita legitur. Sed apud AUGUSTIN. De Civ. Dei, xxii. 6. ex eodem Libro hæc adferuntur: Nullum bellum suscipitur a civitate optima, nisi aut pro fide, aut pro salute. J. B.]

⁹ [Publice jubentur vetita privatim] Idem Seneca de Ira II. cap. 8. Pro gloria habita, quæ, quamdiu opprimi possunt, scelera sunt. Adde quæ infra ex Seneca et Cypriano libro III. cap. 4, § 5. circa finem.

3 Just cause is requisite for public no less than for private war. Seneca complains that the State forbids homicide on a small scale, but commands it on a large one. It is true that wars undertaken by public authority have peculiar jural effects, as public sentences have; but they are not therefore blameless, except there be a reason for them. If Alexander made war on the Persians without cause, he was rightly called a robber by the Scythians, by Seneca, by Lucan, by

ni causa subsit; ut merito Alexander, si sine causa in Persas et alias gentes bellum arripuit, Scythis apud Curtium, sed et Senecæ latro, Lucano prædo appelletur, Indorum <sup>1</sup>quoque sapientibus ἀτάσθαλος, et a <sup>2</sup>pirata quondam tractus sit in criminis societatem: quomodo et ab ejus patre Philippo duos Thraciæ reges regno spoliatos Justinus narrat, fraude latronis ac scelere. Augustini illud huc pertinet: *Remota justitia quid sunt regna, nisi magna latrocinia?* Convenit talibus Lactantii illud: *inanis gloriæ specie capti, sceleribus suis nomen virtutis imponunt.*

4 Causa justa belli suscipiendi nulla esse alia potest nisi injuria. *Iniquitas partis adversæ justa bella ingerit*, inquit idem Augustinus, ubi iniquitatem dixit pro injuria, quasi ἀδικίαν dixisset, cum vellet dicere ἀδικηµα. Sic in Romano Feciali carmine: *Ego vos testor, populum illum injustum esse, neque jus persolvere.*

II. 1 Ac plane quot actionum forensium sunt fontes, totidem sunt belli: nam ubi judicia deficient, incipit bellum. Dantur autem actiones aut ob injuriam non factam, aut ob factam. Ob non factam, ut qua petitur cautio de non offen-

<sup>1</sup> Senecæ latro] Locus est de Benef. i. cap. 13. Non male Justinus Martyr, Apologetico i. [p. 21]. τοσοῦτον δὲ δύνανται ἀρχόντες πρὸ τῆς ἀληθείας δόξαν τιμῶντες, ὅσον καὶ ληστὰί ἐν ἐρημίᾳ. *Tantum possunt principes, qui opinioniones vero præferunt, quantum in solitudine latrones:* Philo: οἱ τὰν μεγάλων ἐργαζόμενοι κλοπᾶς, σεµνοῖς ὀνόμασιν ἀρχῆς ἐπικρύπτοντες ληστείας ἀληθέστερον. *Qui magna furtia committunt, qui honesto principatus no-*

mine obumbrant ea, quæ re ipsa nihil nisi latrocinia sunt. (De Decalog. Pag. 763 D.)

<sup>1</sup> Habet ex ARBIANO, De Exped. Alex. Lib. VII. cap. 1. J. B.

<sup>2</sup> Refertur id a NONIO MARCELLO, e Lib. III. Ciceron. de Republ. Nam quum quæreretur ex eo [Pirata] quo scelere compulsus mare haberet infestum uno myoparone: Eodem, inquit, quo tu [Alexander] orbem terræ. In voc. Myoparo, pag. 534. Vide etiam Augustin.

the Indians; and treated as an equal by a pirate. Philip his father did the like. Augustine says, *Without justice what is empire, but robbery on a great scale?* So Lactantius.

4 A just cause of War is injury done us, and nothing else. Augustine says, *The Injustice* (that is the injury) *of the adverse party makes a war just.* The formula of the Roman Heralds [in declaring war] was, *I call you to witness that that people is unjust, and does not perform its obligations.*

II. 1 There are evidently as many sources of war as there are of Actions at law; for when the judgments of tribunals cease to be of force, war begins. Now Actions are either on account of injury done, or not yet done: Actions for injury not yet done, are when

Curt. vii. 8.  
n. 19.  
Phars. x.  
v. 21.

Lib. III. 15.

De Civ. Dei,  
Lib. v. 4.

Lib. I. de  
Falsa Relig.  
18.

Sylvest. de  
Bell. p. 1. n. 2.

De Civ. Dei,  
xix. 7.

Livius i. 32.

dendo, item damni infecti, et interdicta alia ne vis fiat. Ob factam, aut ut reparatur, aut ut puniatur: quos duos obligationum fontes <sup>b</sup>recte distinguit Plato <sup>3</sup>nono de legibus. Quod reparandum venit, aut spectat id quod nostrum est vel fuit, unde vindicationes et conditiones quædam: aut id quod nobis debetur sive ex pactione, sive ex maleficio, sive ex lege, quo referenda quæ ex quasi contractu et quasi maleficio dicuntur; ex quibus capitibus nascuntur conditiones ceteræ. Factum ut puniendum parit accusationem et judicia publica.

2 Plerique bellorum tres statuunt causas justas, defensionem, recuperationem rerum, et punitionem: quæ tria in Camilli ad Gallos denuntiatione invenias: *Omnia quæ defendi, repetique, et ulcisci fas sit*; in qua enumeratione nisi vox recuperandi sumatur laxius, omissa est persecutio ejus, et quod nobis debetur; quam non omisit Plato, cum dixit bella geri non modo, si quis vi opprimatur, aut expiletur, verum etiam si deceptus fuerit. Quicum illud Senecæ convenit: *Æquissima vox est, et jus gentium præ se ferens, Redde, quod debes.* Et in Fecialium formula erat: *Quas nec dederunt, nec solverunt, nec fecerunt, quas res dari, fieri, solvi*

Bald. ad Lib. 2. c. de Servit. et aq. n. 71. W. Matt. de Bell. Just. et Licit. Liv. v. 40.

Alcib. l. p. 100 A.

De Benef. lib. 14. Liv. i. 32.

De Civit. Dei, iv. 4. J. B.

<sup>b</sup> Recte distinguit Plato] Et ante eum Homerus: nam cum mulctam persolvere proci Penelopes voluissent, ait Ulysses [*Odys.* Lib. xxii. vers. 62, et seqq.]:

οὐδ' εἰ μοι πατρία πάντα ἀποδοῖτε  
 Ὅσσα τε νῦν ἔμῃ ἐστὶ καὶ εἶποθεν ἄλλ'  
 ἀπιδέετε,  
 Οὐδέ κεν εἰς ἔτι χεῖρας ἡμᾶς λήξαιμι φόνοι,  
 Πρὶν πᾶσαν μηστήρας ὑπερβασίην ἀποτίσαι.

patrias non si mihi raptas

Restituatis opes, addatisque altera plura,  
 Abetneam fœdare manus in sanguine vestro,  
 Cuncta prius quam vestra proci delicta lustia.

Cassiodorus, Lib. v. Epist. 35: *Ut qui vindictam remisimus, damna minime sentiamus.* Adde quæ infra hoc libro initius capitum xvi. et xx.

<sup>3</sup> Locus esse videtur, ubi Philosophus ait, Legislatorem ad duo adtendere debere, *injuriam, et damnum*: Καὶ

security is sought that an offense shall not be committed, or that reparation shall be made for an incumbent loss, or an injunction that no force be used. Actions for injury done, are either that it be repaired, or punished; injury to be repaired regards either what is or was ours, as when we reclaim our property, or claim an obligation; or it regards what is owing to us, either by contract, or for wrong done us, or by appointment of law. An act regarded as punishable gives rise to accusation and public trial.

2 Most writers state three just causes of war; defense, recovery of property, and punishment of wrong; which three we find mentioned in the proclamation of Camillus against the Gauls: *All that we may lawfully defend, recover, revenge.* [Compare this with Plato and Seneca.] The formula of the Roman Heralds was, *What things were*

Lib. III. Frag.  
cap. 10. Oral.  
Macr. Lycin.  
Lib. vi. q. 10.  
super Josue.

*oportuit*: et apud Sallustium in historiis: *Jure gentium res repeto*. Augustinus cum dixit: *Justa bella definiri solent, quæ ulciscuntur injurias*: vocem ulciscendi generalius sumsit pro eo, quod est demere: quod et sequentia ostendunt, in quibus non est enumeratio partium, sed exemplorum additio: *Sic gens et civitas petenda est, quæ vel vindicare neglexerit, quod a suis improbe factum est, vel reddere, quod per injurias ablatum est*.

Lib. II. p. 74.

3 Hanc naturalem notitiam secutus Indorum rex, narrante Diodoro, Semiramidem accusabat, *ὅτι προκατάρχεται τοῦ πολέμου μηδὲν ἀδικηθεῖσα* quod bellum inchoaret nulla accepta injuria. Sic et Romani cum Senonibus postulant, ne a quibus nullam injuriam accepissent, eos oppugnarent.

Lib. v. 35.

Analy. Post.  
II. 11.

Aristoteles Apodicticon II. cap. 11. *πολεμοῦσι γὰρ τοῖς πρότερον ἀδικήσασι* Bellum sumi solet in eos, qui priores injuriam fecerunt. De Abiis Scythis Curtius: *Justissimos barbarorum constabat: armis abstinebant nisi lacessiti*. Prima igitur causa justii belli est injuria nondum facta, quæ petit aut corpus, aut rem.

Lib. VII. 6.

Sylv. in Verb.  
Bell. part. I.  
n. 3. et p. 2.

III. Si corpus impetatur vi præsentē cum periculo vitæ non aliter vitabili, tunc bellum esse licitum etiam cum inter-

*πρὸς δύο ταῦτα δὴ βλέπτεον, πρὸς τὴν ἀδικίαν, καὶ βλάβην*. Vide quæ sequuntur, pag. 862, Tom. II. J. B.

<sup>1</sup> *Justa bella definiri solent*] Servius ad IX. *Æneidos de Romanis*: Cum volebant bellum indicare, pater patratus, hoc est princeps *Fœdialium*, proficiscebatur ad hostium fines: et præfatus quædam solemnia clara voce dicebat, se bel-

lum indicare propter certas causas: aut quia socios læserant, aut quia nec abrepta animalia, nec obnoxios redderent. (Ad vers. 53.)

<sup>k</sup> *Nisi lacessiti*] Plutarchus Nicia (Pag. 539 E): καὶ γὰρ τὸν Ἡρακλέα πάντων κρατεῖν ἀμυνόμενον καὶ προεπιχειρούμενον. *Herculem etiam cuncta subegisse, dum lacessitus se defendit*.

to be given, done, and discharged, they have not given, done, and discharged. [See Sallust; Augustine.]

3 Such is the natural feeling of Justice among nations. [See Diodorus, Livy, Aristotle, Curtius.]

Therefore the first cause of a just war is an injury not yet done which menaces body or goods.

III. If the body be menaced by present force with danger of life not otherwise evitable, war is lawful, even to the slaying of the aggressor, as we have before said, in proving some private war to be lawful. And this right of defense arises from the natural right of self-protection, not from the injustice or fault of another who makes the danger. And therefore this right of self-protection is not taken away, even if the aggressor be blameless; if, for instance, he be a

fectione periculum inferentis ante diximus, cum ex hac specie, ut maxime probata, ostendimus bellum aliquod privatum justum esse posse. Notandum est jus hoc defensionis per se ac primario nasci ex eo, quod natura quemque sibi commendat, non ex injustitia aut peccato alterius, unde periculum est. Quare etiamsi ille peccato careat, puta quod bona fide militet, aut alium me putet quam sim, aut quod insania aut insomniis agitetur, ut evenisse quibusdam legimus, non eo tollitur jus se tuendi, cum sufficiat, quod ego non teneor id, quod ille intentat, pati, non magis quam si bestia aliena periculum intentaret.

Bart. ad l. ut  
Fim. D. de  
Just. et Jur.  
Bal. in Rep.  
l. 1. c. Unde  
vi. Bann. II.  
q. 10. Art. 10.  
Dub. ult.  
Soto, IV.  
Disp. 8. Art.  
10. Valent.  
II. 2. Disp. 5.  
q. 10. p. 7.

IV. 1 An et innocentes, qui interpositi defensionem aut fugam, sine qua evadi mors non potest, impediunt transfodi aut obteri possint, disputatur. Sunt qui licere id putant, etiam Theologi. Et certe naturam solam si respicimus, multo apud eam minor est societatis respectus quam propriæ salutis cura. At lex dilectionis, præsertim Evangelicæ, quæ alterum nobis æquat, plane id non permittit.

Card. q. 33.  
Lib. I.  
Petr. Nav. XI.  
3. n. 147.  
Cajet. II. 2.  
Art. 67. q. 2.

2 Bene autem dictum est a Thoma, si recte accipiatur, in vera defensione hominem non occidi ex intentione: non quod non interdum, si alia salutis non suppetat ratio, non

II. 2. q. 64.  
Art. 7.

Josephus XVII. *Antiquæ Historiæ*: οἱ παρελθόντες καὶ μὴ πρὸς [Legendum videtur πρὸς μὴ] διασσομένους ἀρχοντες ἀδικῶν ἔργων, οἱ δὲ εἰσὶν οἱ βιαζόμενοι καὶ μὴ θέλοντας τοὺς ἀμνομένους ἐφ' ὄπλα χωρεῖν. *Qui in id veniunt, ut in nihil hostile cogitantes violentas inferant manus, hi sunt, qui invitos, cogunt ad arma semet tutature*

*confugere.* (Cap. IX. § 6.)

<sup>4</sup> Sed illa alterum nobis non præfert, ut ipse Auctor observavit supra, Lib. I. cap. 3, § 3. num. 3. Ceteris paribus, sibi quisque proximus est. Et heic magis etiam valet, quod Auctor postea adfert e *Thoma Aquinate*, calculo suo adjecto. Vide de tota hac materia sui ipsius defensionis, PUFENDORFIUM nos-

soldier acting *bonæ fide*; or if he take me for another than I am, or if he be insane or a sleepwalker, such as we read of; it is sufficient that I am not bound to suffer what he attempts to inflict; just as if a wild beast were to attack me.

IV. 1 Whether innocent persons, who, interposing prevent the defense or flight without which death cannot be avoided may be cut down or trampled down, is a question. There are who think it lawful, even Divines. And certainly if we only look at Natural Law, that cares much less for ties of society, than for the defense of the individual. But the law of love, especially the Evangelical law, which commands us to regard another as ourselves, plainly does not permit this.

2 Thomas Aquinas well says, if it be rightly taken, that a man killed in self-defense is not killed by intention: not that sometimes,



liceat destinato id facere, unde mors aggressoris sit secutura, sed quod hic mors illa non eligatur, ut quiddam primario intentum, sicut in punitione judiciali, sed ut unicum, quod eo tempore suppetit; cum is qui impetitus jam est, etiam illo tempore malle debeat tale aliquid facere, quo alter absterreatur, aut debilitetur, quam quo intereat.

V. 1 <sup>1</sup>Periculum præsens hic requiritur, et quasi in puncto. Fateor quidem, si insultator arma arripiat, et quidem ita ut appareat eum id facere occidendi animo, occupari posse facinus: nam in moralibus, ut et in naturalibus punctum non invenitur sine aliqua latitudine: sed multum falluntur et fallunt, qui metum qualemcumque ad jus occupandæ interfectionis admittunt. Vere enim dictum est a Cicerone primo de officiis: plurimas injurias a metu proficisci, cum is, qui nocere alteri cogitat, timet, ne nisi id fecerit, ipse aliquo

Cap. 7. *De Rep. Cyr.* II. 5. *afficiatur incommodo. Clearchus apud Xenophontem: καὶ γὰρ οἶδα ἤδη ἀνθρώπους, τοὺς μὲν ἐκ διαβολῆς, τοὺς δὲ ἐξ ὑποψίας, οἱ φοβηθέντες ἀλλήλους, φθάσαι βουλόμενοι πρὶν παθεῖν, ἐποίησαν ἀνήκεστα κακὰ τοὺς οὔτε μέλλοντας, οὔτε βουλομένους τοιοῦτον οὐδέν· multos ego novi, qui calumnia adducti aut suspicione, dum metuunt alios, et prævenire malunt quam perpeti, atrocissimis malis eos affecerunt, qui nihil tale facturi fuerant, ac ne cogitaverant quidem. Cato in oratione pro Rhodiensibus: quod illos dicimus voluisse*

Apud Aul. Gell. vii. 3.

trum *De Jure Nat. et Gent.* Lib. II. cap. 5. *J. B.*

<sup>1</sup> *Periculum præsens*] Hujus distinctionis usum egregium vide apud *Agathiam* IV. [ubi de cæde *Gubazi*, c. 1. 2.] Apud *Thucydidem* *Octavo Phrynichus*: ὅτι ἀνεπίφθορον οἱ ἤδη εἶη περὶ τῆς ψυχῆς δι' ἐκείνους κινδυνεύοντι καὶ τοῦτο καὶ ἄλλο τι ἂν δρᾶσαι μᾶλλον ἢ ὑπὸ τῶν ἐχθίστων αὐτὸν διαφθαρή-

vai. *Cariturum invidia, si ipse jam in vitæ per ipsos adductus periculum, et hoc et aliud quidvis aggrediatur potius quam ab hominibus inimicissimis perdi se sinat.* [Locus est § 50. Sed ubi casus alius est, quam de quo hec agitur. *J. B.*]

<sup>2</sup> Ita quoque habet in *Excerptis ex Trag. et Com. Græcis*, pag. 390: quamquam verba ceteroquin non plane sint

if no other way of safety appear, it may not be lawful to do that of set purpose, which will cause the death of the aggressor, but that such death is not chosen as something primarily intended, as in judicial punishment it is, but it is chosen as the only thing which is then possible; since he who is attacked, even then ought to do anything by which the assailant may be scared away, or deprived of power, rather than by which he may be killed.

V. 1 Present danger is here required, and imminent in a point

*facere, id nos priores facere occupabimus?* Insignis est illa apud Gellium sententia: *Gladiatorum composito ad pugnam pugna hæc proposita sors est, aut occidere, si occupaverit, aut occumbere, si cessaverit. Hominum autem vita non tam iniquis, neque tam indomitibus necessitatibus circumscripta est, ut idcirco prior injuriam facere debeas; quam nisi feceris, pati possis.* Et apud Ciceronem alio loco non minus recte: *Quis hoc statuit unquam, aut cui concedi sine summo omnium periculo potest, ut eum jure potuerit occidere, a quo metuisse se dicat, ne ipse posterius occideretur?* Locum hic habet illud Euripidis:

Εἰ γὰρ σ' ἐμῆθεν ὄς σὺ φῆς κτείνειν πόσις,  
 Χρὴ καὶ σε μέλλειν, ὡς χρόνος δῆθεν παρήν.  
 Te si, ut ais, interficere vir voluit tuus,  
 Voluisse sat erat et tibi, ubi tempus foret.

Cui geminum est Thucydideum illud: τὸ μέλλον ἐν ἀφανεί Lib. I. 42.  
 ἔτι κεῖται, καὶ οὐκ ἄξιον ἐπαρθέντας αὐτῷ φανεράν ἔχθραν  
 ἤδη καὶ οὐ μέλλουσαν κτήσασθαι. *Futurum in incerto adhuc  
 est: nec quemquam oportet eo commotum inimicitias susci-  
 pere, non jam futuras sed certas.* Idem Thucydides quo loco Lib. III. 82.  
 mala seditionum quæ Græcas civitates incesserant diserte ex-  
 plicat, ponit et hoc in vitio: ὁ φθάσας τὸν μέλλοντα κακὸν  
 τι δρᾶν ἐπηρεῖτο. *laudabatur qui malum facinus quod fac-  
 turus erat alter ipse occupasset.* Livius: <sup>m</sup> *Cavendo ne me-* Lib. III. 65.

eadem. Sed dicere debuit *meus*: loquitur enim *Merope* de viro suo, a *Polyphonte* fratre interfecto. Fragmentum est e *Cresphonte*, apud *Aulum Gellium*, Lib. VII. c. 3. unde quædam supra adduxit. *J. B.*

<sup>m</sup> *Cavendo ne metuant homines, metuendos ultro se efficiunt!* Ut *Cæsar*, qui cum rempublicam occuparet, dicebat adversariorum metu se eo adductum.

Locus est egregius apud *Appianum* *Civilium* II. [Nihil tale reperitur in toto illo libro nec alibi, quod sciam, apud *Appianum*. Videtur Auctor noster in animo habuisse quod aiebat *Jul. Cæsar* in literis ad *Senatum*, dum in armis esset *Pompeius*, iniquum fore, se cogi, ut ea deponeret, quippe qui sic hostibus traderetur: Apud *DION CASSIUM*, Lib. XLI. init. pag. 171 c. *Ed. H. Steph.*

of time. I confess indeed that if the aggressor be taking up weapons, and in such a way that he manifestly does so with the intent to kill, the deed may be anticipated; for in moral things, as in natural, there is no point without a certain latitude: but they are in great error who allow any fear [however slight] as a right of killing for prevention. It is well said by *Cicero* that most injuries proceed from fear, he who meditates hurting another, fearing that if he do not do so, he will suffer some evil. So *Clearchus* in *Xenophon*, *Cato* for the *Rhodians*.

*tuant homines, metuendos ultro se efficiunt, et injuriam a nobis repulsam, tanquam aut facere aut pati necesse sit, injungimus aliis.* In tales non male convenit illud Vibii

*Inst. Orat.*  
viii. 5.  
*Lib. iv. p. 610.*

Crispi a Quintiliano laudatum, *Quis tibi sic timere permisit?* Etiam Livia apud Dionem ait, infamiam eos non effugere, qui facinus quod timent, occupant.

2 Quod si quis vim non jam præsentem intentet, sed conjurasse aut insidiari compertus sit, si venenum struere, si falsam accusationem, falsum testimonium, iniquum judicium moliri, hunc nego jure posse interfici; si aut aliter evadi periculum potest: aut non certum satis est aliter evadi non posse. Plerumque enim interposita temporis mora ad multa remedia, ad multos etiam casus patet: ut dici solet, inter os et offam: quamquam non desunt et Theologi, et Jurisconsulti, qui indulgentiam suam longius extendant. Sed et

*Bann. q. 64.*  
*Art. 7. duob. 4.*

Neque enim APPIANUS, dict. Lib. II. pag. 448. ubi de eadem re, ullam metus mentionem facit. Vitio memoris igitur Auctor duos istos Historicos inter se confudit. Adde dictum aliud ejusdem CÆSARIS apud SUETON. in *Jul.* c. 30. et PLUTARCHUM, *Vit. Cæs.* p. 730 A. J. B.]  
 6 Innuit locum Denter. xxii. 25, 26. unde tamen, si series orationis perpendatur, non potest elici, saltem directe, pudicitiam vite adæquari. J. B.

7 *Pudicitiam vite adæquet*] Seneca de *Beneficiis* primo, capite undecimo: *Proxima ab his sunt sine quibus possumus quidem vivere, sed ut mors potior sit, tanquam libertas, et pudicitia, et mens*

*bona.* Paulus Sententiarum v. tit. xxiii. § 3. *qui latronem cædem sibi inferentem, vel alium quemlibet stuprum inferentem occiderit, puniri non placuit. Alius enim vitam, alius pudorem publico facinore defendit.* Augustinus libro 1. de *Libero Arbitrio: Lex dat potestatem vel viatori ut latronem, ne ab eo ipse occidatur, occidat; vel cuiquam viro aut feminae ut violente sibi stupratorem irruentem, aut post illatum stuprum, si possit, interimat.* [Cap. 5. Ita hunc locum Augustini Auctor noster laudaverat; unde in sequentibus Edd. fecerant, *ante aut post illatum stuprum &c.* nulla necessitate,posito etiam sensu, quem Auc-

[Sec.] Gellius says, a man is not to act like a gladiator, who must kill or be killed. So Cicero, quoted by Quintilian: Euripides, Thucydides, Livy. Quintilian quotes, *Who allowed you such fear?* And so Livia in Dio. [See.]

2 If any one direct against us violence not present; as if he make a conspiracy, or lay an ambush, or put poison in our way, or assail us with a false accusation, false testimony, or iniquitous judgment; I deny that he may be lawfully slain, if either the danger may be otherwise avoided, or it be not certain that it cannot be otherwise avoided. For delay allows recourse to many remedies and many chances; as we say, between the cup and the lip. Although there are not wanting both Jurists and Divines who extend the indulgence further. But the other opinion, which is the better and safer, is also not without its authorities.

altera, quæ melior tutiorque sententia est, suis non caret auctoribus.

VI. Quid dicemus de periculo mutilationis membri? Sane cum damnum membri, præsertim e præcipuis, valde sit grave, et vitæ quasi æquiparabile: adde quod vix sciri queat an non periculum mortis post se trahat, si aliter vitari nequeat, putem intentantem periculum occidi recte posse.

VII. Pro pudicitia quin idem liceat, controversiam vix habet, cum non tantum communis æstimatio, sed et lex divina pudicitiam vitæ adæquet. Itaque Paulus Jurisconsultus dixit pudorem tali facinore recte defendi. Exemplum habemus in Tribuno Marii a milite occiso apud Ciceronem et Quintilianum: sed et a feminis occisorum in historiis exstant. Chariclea apud Heliodorum talem interfectionem vocat ἰαμύνης νόμον τῆς εἰς σωφροσύνην ὑβρεως, justam defensionem ad arcendam injuriam in castitatem.

tor putavit inesse; Sed ille sensus minime congruit cum serie orationis; unde SAMUEL RACHELIUS, *Tract. De Puellis*, § 23. recte hec observavit *διάρτημα* quoddam *μημονικόν*: quum Editiones et recentiores, et vetustiores, habeant tantum: *ante illatum stuprum*. Ita et ultima Parisina, a Monachis Benedictinis curata. Sic etiam dudum locus adlatus est a CUSACIO, *Not. in Jul. Paul. Recept. Sent.* quamvis in Editione Cl. Schultingii, v. 23, 8, pag. 508. legatur, *aut ill. stupr.* mendo ex Editione Fabricii orto, et satis per se manifesto, etai alio Editionis non illud arguerent.

o *Apud Ciceronem*] Vide et Plutar-

chum *Mario*. [Pag. 413. Locus autem Ciceronis est *Orat. pro Mil.* c. 4. et Quintiliani *Declamatio*, cui titulus, *Tribunus Marianus*. J. B.] Mars quoque Deorum judicio absolutus dicitur, interfecto eo, qui filis ipsius stuprum inferebat. Testis Apollodorus bibliothecæ III. (Cap. xiii. § 2. *Ed. Gal.*) Adde insignem historiam apud Gregorium Turonensem libro nono.

7 Locus est in Lib. 1. non longe ab initia, ubi ita Virgo loquitur: "Ὅσοι δὲ πρὸς ἡμῶν [ἀνήρθθη] ἀμύνης νόμος καὶ ἐκδικίας καὶ εἰς σωφροσύνην ὑβρεως περὸνθατε. Pag. 7. *Édit. Bourdelot.* J. B.

VI. What shall we say of peril of mutilation of limb? Since the loss of a limb, especially of a principal one, is very grievous, and nearly equal to loss of life; and since, moreover, it can hardly be known whether it do not bring in its train loss of life; if it cannot otherwise be avoided, I think the author of such danger may be slain.

VII. Whether the same be lawful in defense of chastity, can scarcely be doubted, since not only common estimation, but the divine law, makes chastity of the same value as life. [He refers to Deut. xxii. 25, *If a man find a betrothed damsel in the field, &c., the man shall die*; which J. B. observes, hardly justifies his saying that chastity is on a par with life.] And so Paulus the Jurist decided. An example occurs in a Tribune of Marius, killed by a soldier, in

Soto, d. i. q.  
8; lv. in Ferò.  
Belium, p. 2.  
n. 5.

VIII. Quod autem diximus supra, quanquam occidere parantem occidere licet, laudabilius tamen eum facere qui occidi quam occidere malit, id nonnulli ita concedunt, ut excipiant personam multis utilem: Sed mihi hanc patientiæ contrariam legem omnibus illis imponere, quos vivere aliorum interest, parum tutum videtur. Itaque restringendum id arbitrer ad eos, quorum officium est ab aliis vim arcere, quales sunt socii itineris ea lege contracti, et rectores publici, quibus illud Lucani aptari potest [Lib. v. vers. 685, et seqq.] :

<sup>p</sup> Cum tot ab hac anima populorum vita salusque  
Pendeat, et tantus caput hoc sibi fecerit orbis,  
Sævitia est voluisse mori.

Soto, d. loco.

IX. 1 Contra vero evenire potest, ut quia inuasoris vita multis sit utilis, occidi is sine peccato nequeat: nec id tantum ex vi legis divinæ, sive veteris sive novæ, de quibus egimus supra cum regis personam sanctam esse ostendimus, sed ipso etiam naturæ jure. Nam jus naturæ, quatenus legem significat, non ea tantum respicit, quæ dictat justitia, quam explicitam diximus, sed aliarum quoque virtutum, temperantiæ, fortitudinis, prudentiæ actus in se continet, ut in certis circum-

<sup>p</sup> Cum tot ab hac anima] Curtius  
Lib. ix. *Sed cum tam avide manifestis  
periculis offeras corpus, oblitus tot civium  
animas trahere te in casum.* (Cap. 6.  
num. 8).

<sup>8</sup> At vero quemadmodum manifesta  
est injuria, et intoleranda, Principis, qui  
sine ulla causa privatam subditum in-  
vadit, vitæ ipsius imminens: ita utilitas  
ad Rempubliam reditura, si Innocens

Cicero and Quintilian. There are also examples of men in such cases killed by women. Such Chariclea in Hierocles justifies. [See.]

VIII. Though, as we have said, it be lawful to kill him who is preparing to kill, yet he acts more laudably who would rather be killed than kill; this is granted by some, making the exception of a person whose life is important to many. But to impose this rule, contrary to forbearance, on all whose lives concern other persons, seems very unsafe. It must, I think, be restricted to those whose duty it is to protect others from force; such as companies on the road, who are under such an engagement, and public Rulers: as Lucan says. [See.]

IX. 1 On the other hand, it may happen that because the life of the aggressor is useful to many, he cannot be killed without sin; and that, not only by the divine law, but by Natural Law. For Natural Law not only respects what corrective justice dictates, but also contains in itself acts of other virtues, as temperance, fortitude, prudence, as in certain circumstances not only good but obligatory. Now bene-

stantiis, non honestos tantum sed et debitos. Ad id vero, quod diximus, caritas nos obstringit.

2 Nec ab hac sententia dimovet me Vasquius, cum ait principem, qui innocentem insultet, desinere principem esse ipso facto: quo vix quicquam potuit dici aut minus vere aut magis periculose. Nam sicut dominia, ita et imperia non amittuntur delinquendo, nisi lex id statuatur. Quæ autem hoc de imperiis statueret lex, ut delicto in privatum amitterentur, nusquam reperta est, nec repertum iri credo: summam enim rerum confusionem induceret. Quod autem Vasquius et huic, et aliis multis illationibus fundamentum ponit, imperia omnia parentium non imperantium utilitatem spectare, id etiam si verum universim esset, ad rem non faceret: non enim statim res deficit, cujus utilitas aliqua in parte deficit. Quod vero addit, reipublicæ incolumitatem a singulis propter se desiderari, atque ideo debere quemque etiam toti reipublicæ suam salutem antepone, non satis cohæret. Nam nostri quidem causa rempublicam salvam esse volumus, sed non tantum nostri, verum et aliorum <sup>2</sup>.

3 Falsa enim et a sanioribus philosophis rejecta est opinio <sup>3</sup> existimantium amicitiam ex sola indigentia natam,

patiatur se interfici, dubia admodum est, ne quid gravius dicam. De ea re egimus uberius in nostris ad hunc locum Notis Gallicis. J. B.

<sup>3</sup> *Existimantium amicitiam ex sola indigentia natam*] Refutat perniciosam hanc opinionem Seneca libro 1. *de Beneficiis* capite 1. et libro 1v. cap. xvi.

volence binds to act as we have said.

2 Vasquius says that a prince, when he insults an innocent man, ceases to be a prince: but nothing can be less true or more dangerous. For as ownership, so political authority, is not lost by delinquency, except the law so direct. But there never was a law that such authority should cease by an offence against a private person; and I believe, never will be. And what Vasquius lays down as the foundation of this and many other inferences, that all authority looks to the good of those who obey, not of those who command, even if it were universally true, is nothing to the purpose. For a thing does not fail because its utility in some one point fails. What he adds, that the safety of the community is desired by each for his own sake, and therefore each must prefer his own safety to that of the community, does not hang together. For we desire the safety of the community for our own sake, but not our own sake only, but that of others also. [J. B. doubts whether this be conclusive.]

3 The opinion of those who think that friendship arises from need

cum sponte et natura nostra ad eam feramur. Ut vero meo unius bono multorum admodum bonum præferam; caritas monet sæpe, imperat interdum. Hic illud Senecæ pertinet: *Principes regesque, et quicumque alio nomine sunt tutores status publici, non est mirum amari ultra privatas etiam necessitudines. Nam si sanis hominibus publica privatis potiora sunt, sequitur, ut is quoque carior sit, in quem se respublica convertit.* Ambrosius: *Sibi cum quisque arbitretur gratius excidia patriæ depulisse, quam propria pericula.* Is quem dixi Seneca: *Callistratus et Rutilius, hic Athenis, ille Romæ, reddi sibi penates suos noluerunt clade communi: quia satius erat duos unico malo affici, quam omnes publico.*

De Clement.  
l. 4.

De Officiis,  
lib. 3.

De Benef.  
vi. 37.

X. 1 Si cui periculum immineat accipiendæ alapæ, aut mali similis, huic quoque jus esse id arcendi cum cæde inimici, sunt qui putant. Ego, si mera justitia expletrix respiciatur, non dissentio. Quanquam enim inæqualia sunt mors et alapa, tamen qui injuria me parat afficere, is mihi eo ipso dat jus, hoc est, facultatem quandam moralem adver-

Soto, d. loco.  
Navarr. 16.  
n. 3.  
Sylv. in Verbo  
Homicid. l.  
9. 2.  
Lad. Lopez.  
62.

*Principes regesque]* Plutarchus *Pelopidæ* initio (pag. 278 D): ἀρετῆς πρῶτον ἔργον σώζειν τὸν ἅπαντα ἀλλὰ σώζοντα primum virtutis opus servare servantem cætera. Cassiodorus *de Amicitia*: *Si manus oculorum obsequio vibratum in aliud membrum senserit gladium imminuent, ipsa suum minime discrimen attendens, plus alii quam sibi timens, gladium excipit.* Post:

*Proinde qui morte propria dominos suos a morte redimunt, recte quidem hoc faciunt, si potius salutem animæ suæ quam liberationem alienæ corporis in causa constituunt: cum enim eis conscientia dictet, quod fidem dominis suis debeant exhibere, videtur etiam consonum rationi, quod suæ vitæ corporali vitam dominorum debeant anteferre.* Deinde rursus: *Dilectione itaque, et maxime pro salute*

only, is false, and rejected by the soundest philosophers; for we have a natural tendency to friendship. And that I should prefer to my sole good the good of many, benevolence often counsels, sometimes commands. So Seneca and Ambrose. [See.]

X. 1 If any one be in danger of receiving a buffet, or the like evil, some hold that he has a right to protect himself by killing his enemy. If merely corrective justice be regarded, I do not dissent. For though a buffet and death are very unequal, yet he who is about to do me an injury, thereby gives me a Right, that is a moral claim against him, *in infinitum*, so far as I cannot otherwise repel the evil. And even benevolence *per se* does not appear to bind us to the advantage of him who does us wrong. But the Gospel law has made every such act unlawful: for Christ commands us to take a buffet, rather than hurt our adversary; how much less may we kill him? We must

sus se in infinitum, quatenus aliter malum illud a me arcere nequeo. Caritas quoque per se non videtur nos hic obstringere in gratiam nocentis. At lex evangelica omnino tale factum illicitum reddidit: jubet enim Christus alapam accipi potius quam adversario noceatur; quanto magis occidi eum vetat alapæ effugiendæ causa? Quo exemplo monemur cavere a dicto Covarruviæ, non pati humanam cognitionem, juris naturalis non ignaram, quicquam naturali ratione permitti, quod apud Deum, qui ipsamet natura est, non sit idem permissum. Nam Deus, qui ita auctor est naturæ, ut et supra naturam agat libere, jus habet nobis leges præscribendi etiam de his rebus, quæ natura sua liberæ indefinitæque sunt: multoque magis ut debeatur id quod natura honestum est, etsi non debitum.

Diet. § 1. p. 3.  
In Clem. Si  
Furiosus.

2 Mirum autem est, cum Dei voluntas in Evangelio tam diserte appareat, inveniri Theologos, et Christianos Theologos, qui non modo eadem recte putent admitti, ut alapa vitetur, sed et accepta alapa, si qui eam impegit fugiat, ad honorem ut aiunt recuperandum: quod mihi a ratione et pietate valde

Navarr. 15. 4.  
Henr. de Ir-  
regul. 11.  
Vict. de Jure  
Bell. n. 5.

*multorum, potest quis salubriter morti suum corpus exponere.*

• *Facultatem quandam moralem]*

Apollodorus Lib. II. de Lino agens: ἀφικόμενοι δὲ εἰς Θήβας καὶ Θηβαῖος γερόμενος, ὑπὸ Ἑρακλείου τῆ κίθαρᾷ πλῆγῃσι ἀπέθανεν. ἐπιπλήξαντα γὰρ αὐτὸν ὀργισθεὶς ἀπέκτεινε· δίκην δὲ ἐπαγόντων τινῶν αὐτῷ φόνου, παρανέγγε νόμος Ῥαδαμάνθου, ὅτι ἂν ἀμύνη-

ται τῶν χειρῶν ἀδίκων ἄρξαντι, ἀθῶου εἶναι. Ad Thebas cum venisset, civisque Thebanus factus esset, ibi intulit ab Hercule percussus cithara: nam cum Linus ferisset Herculem, iratus Hercules mortem ei intulit, resusque a nonnullis factus patratæ cædis, legit in judicio legem Rhadamanthi, qua insons pronuntiatur, si quis nocuerit ei, qui vim prior intulerit. (Cap. iv. § 9).

therefore beware of the doctrine of Covarruvias, that with Natural Law in our minds, we cannot conceive anything permitted by natural reason which is not permitted by God, since God is Nature itself. For God, who is the author of nature in such a way that he is above Nature, has a right to prescribe laws to us concerning the things which by nature are free and undetermined; much more, that that be duty which by nature is good, though not duty.

2 It is wonderful, since the will of God appears so clearly in the Gospel, that there should be found Theologians, and Christian Theologians, who not only think killing may be permitted to avoid a buffet, but even when a buffet has been received, if the striker flies, for the recovery of honour, as it is called. This seems to me very far removed from reason and piety. For honour is an opinion of one's own excellence; and he who bears such an injury shews himself excellently patient, and



alienum videtur. Nam honor est opinio de excellentia: at qui talem fert injuriam, is patientem se excellenter ostendit: atque ideo honorem auget magis, quam minuit: nec refert, si quidam corrupto judicio virtutem hanc in probrum confictis nominibus traducant: perversa enim illa judicia nec rem nec rei æstimationem immutant. Nec Christiani veteres hoc tantum viderunt, sed et philosophi, qui dixerunt pusilli esse animi contumeliam ferre non posse, ut alibi ostendimus.

3 Hinc etiam liquet, quam non probandum sit, quod a plerisque est traditum, defensionem cum interfectione esse licitam, jure scilicet divino (nam de solo naturæ jure, quo minus ita sit, non disputo) etiam si quis fugere sine periculo possit, quia fuga scilicet ignominiosa sit, in nobili præsertim homine. Atqui nulla hic ignominia est, sed falsa quædam ignominie opinio, spernenda ab omnibus iis, qui virtutem et sapientiam sectantur: qua in re gaudeo me assentientem habere inter Jurisconsultos Carolum Molinæum. Quod de alapa et fuga dixi, idem dictum volo de aliis rebus, per quas vera existimatio non læditur. Quid si vero dicat aliquis de nobis, quod creditum apud bonos existimationem nostram delibaret? Hunc quoque occidi posse sunt qui doceant: mendose admodum, et contra naturæ quoque jus: nam interfectio ista non est modus aptus ad tuendam existimationem.

<sup>o</sup> Vide supra, Lib. I. cap. iii. § 2.  
num. 2. J. B.

<sup>t</sup> *Et inde sumta lex XII. Tabularum*  
Addi potest *lex Wisigothorum* libro VII.

Boto, Art. 8.  
d. g. 5. Dd.  
in Lib ut  
vini. D. de  
Just. et Juris.  
et in l. 1. c.  
unde vi.  
Vasquez D.  
c. 18. n. 13, 14.  
Sylv. in Verb.  
Bell. p. 2. n. 4.

In addit. ad  
Alex. cons.  
114.

Petr. Navar.  
ii. 3. n. 376.

so increases his honour rather than diminishes. Nor does it make any difference if some of corrupt judgment turn this virtue into a disgrace by artificial names: for those perverse judgments neither change the fact nor its value. And not only the ancient Christians said this, but also the philosophers, who said it was the part of a little mind not to be able to bear contumely, as we shall shew elsewhere.

3 Hence it appears also that that is wrong which is delivered by most writers, that defense with slaying is lawful, that is by Divine Law, (for I do not dispute that it is by Natural Law,) when flight without danger is possible: namely, because flight is ignominious, especially in a man of noble family. In truth there is, then, no ignominy, but a false opinion of ignominy, to be despised by those who follow virtue and wisdom. In this matter I rejoice that I have with me the opinion, among the Jurists, of Molinæus.

What I have said of a buffet and of flight, is to be understood of other things, by which our true estimation is not damaged.

But if any one say something of us, which if believed, would

XI. Veniamus ad injurias, quibus res nostræ impetuntur. Si expletricem justitiam respicimus, non negabo ad res conservandas raptorem, si ita opus sit, vel interfici posse: nam quæ inter rem et vitam est inæqualitas, ea favore innocentis et raptoris odio compensatur, ut supra diximus: unde sequitur, si id jus solum respiciamus, posse furem cum re fugientem, si aliter res recuperari nequeat, jaculo prosterni. Demosthenes oratione in Aristocratem: εἴτ' οὐ δεινὸν, ὧ <sup>p. 43</sup> γῆ καὶ θεοί, καὶ φανερώς παράνομον, οὐ μόνον παρὰ τὸν γεγραμμένον νόμον, ἀλλὰ καὶ παρὰ τὸν κοινὸν ἀπάντων ἀνθρώπων νόμον, τὸν ἄγοντα καὶ φέροντα βία τὰμὰ ἐν πολέμιον μοίρα, μὴ ἐξείναι μοι ἀμύνεσθαι. *Nonne hoc per Deos durum atque injustum est, nec scriptis tantum legibus, sed et communi inter homines legi contrarium, ut non sinar vi uti adversus eum, qui hostiliter res meas rapiat?* Nec obstat caritas per modum præcepti, lege divina humanaque seposita, nisi res sit, quæ minimum valeat, ac proinde contemni mereatur: quam exceptionem recte nonnulli ad-jiciunt.

XII. 1 Quis sensus sit legis Hebrææ videamus, cum qua congruit et lex Solonis vetus, <sup>9</sup>quam Demosthenes adversus Timocratem commemorat, <sup>t</sup>et inde sumta lex XII. Tabu-

tit. II. cap. xvi. et Capitulare Caroli Magni Lib. v. cap. 191. Lege Lango-

barda, qui nocte alienam curtem ingreditur, nisi ligandum se præbeat, occidi

detract from our reputation among good men, what then? There are who teach that he also may be slain: very wrongly, and even contrary to Natural Law; for such slaying is not a course fitted to protect our reputation.

XI. Let us come to injuries by which our property is attacked.

If we regard corrective justice, I do not deny that in order to preserve our goods, the robber, if need be, may be killed; for the difference that there is between things and life, is compensated by the preference to be given to the innocent, and the condemnation incurred by the robber, as we have said. Whence it follows that if we regard Natural Law alone, the thief flying with his plunder may, if the goods cannot otherwise be recovered, be slain with a missile. So Demosthenes against Aristocrates. [See.] Nor does benevolence oppose this as a command; setting aside human and divine law; except the thing stolen be a trifle which may be contemned; an exception rightly added by some.

XII. 1 Let us look at the sense of the Hebrew Law, (Exod. xxii. 2) with which agrees the law of Solon, and of the Twelve Tables,

larum; et <sup>1</sup>Platonis scitum nono de legibus. Nam omnes istæ leges in hoc conveniunt, quod furem nocturnum a diurno distinguunt: de ratione legis ambigitur. Quidam id unum putant spectatum, quod noctu discerni nequeat is qui venit, fur sit, an sicarius, et ideo tanquam sicarium posse interfici. Alii discrimen in hoc positum existiment, quod noctu, quia fur ignotus sit, res minus videantur posse recuperari. Mihi legum conditores nec hoc nec illud proprie videntur spectasse; sed hoc voluisse potius, directe rerum causa interfici neminem debere: quod fieret, exempli causa, si fugientem inermem <sup>2</sup>telo prosternerem, ut illo interemto rem meam reciperem: sed si ipse in periculum vitæ adducar, tunc mihi licere a me avertere periculum etiam cum periculo vitæ alienæ: nec obstare mihi quod me in id discrimen adduxerim, dum rem meam cupio retinere, aut occupatam extorquere, aut furem capere, nam in his omnibus nihil mihi posse imputari, qui verser in actu licito, nec cuiquam injuriam faciam, cum utar meo jure.

2 Discrimen ergo nocturni et diurni furis in hoc positum est, quod noctu vix sit copia testium adhibendorum: atque

potest. [Lib. i. Tit. xxiv. cap. 1.]

<sup>1</sup> Νύκτωρ φῶρα εἰς οἰκίαν εἰσέλθοντα ἐπὶ κλοπῇ χρημάτων τὰν ἐλῶν κτείνειν τις, καθαρὸν ἔστω. Pag. 874 B. Tom. 11. Ed. H. Steph. J. B.

<sup>2</sup> Addidi vocem hanc *inermem*, quæ, quamquam in omnibus Editionibus desit, omnino necessaria est, ut series orationis constet, et species ista differat a se-

quente, in qua Fur etiam fugere manifesto supponitur, sed ita ut se telo defenderet. Vel sic tamen non satis firma et cohærens est Auctoris nostri ratiocinatio. Vide Notas Gallicas in b. l. Adde PUFENDORFII nostri Caput antea indicatum. J. B.

<sup>3</sup> Exceptio illa ideo additur, quod interdiu facile cognosci aut capi Fur

and Plato's *Laws*. These laws all agree in distinguishing the nocturnal from the diurnal thief\*. Some think that this is because by night we cannot tell whether he is a thief or a murderer, and therefore may kill him as a murderer. Others think it is because by night we have less chance of recovering the property. I think that neither is the true ground; but this; that no one ought to be slain directly for the sake of mere things, which would be done if I were to kill an unarmed flying thief with a missile, and so recover my goods: but if I am myself in danger of life, then I may repel the danger even with danger to the life of another; nor does this cease to hold, however I have come into that danger, whether by trying to retain my property, or to recover it, or to capture the thief; for in all these cases I am acting lawfully according to my right.

\* See *Elements of Morality*, 665.

Soto d. loco: Math. Notab. 135. Jas. et Gov. Instit. de Act. in pr. Covar. d. § 1. n. ibi. Decimo. Less. dub. xl. n. 63. Covar. d. loco. Aug. citat. in c. si Profodiens. de Homicid. Less. d. cap. 9. dub. xl. n. 66.

ideo, si occisus fur reperiatur, facilius credatur ei, qui a se vitæ tuendæ causa dicat furem interentum, repertum scilicet cum aliquo instrumento, quo nocere posset. Id enim lex Hebræa requirit, agens de fure reperto במחתרם : quod quidam transferunt in *perfossione*; alii forte melius, cum *perfossorio instrumento*: quomodo et Jeremiæ ii. 34 ea vox a doctissimis Hebræorum exponitur. Ducit nos ad hanc interpretationem lex duodecim tabularum, quæ furem diurnum occidi vetat, <sup>3</sup>addita exceptione, nisi se telo defenderit. Adversus nocturnum igitur præsumtio est defendisse se telo. Teli autem nomine ferrum, fustis et lapis venit, ut ad hanc ipsam legem notatum a Caio est. Contra ab Ulpiano proditum est, quod de fure nocturno dicitur, si quis eum occiderit, impune id ferre, id intelligendum ita demum locum habere, <sup>4</sup>si parcere ei sine periculo suo non potuit, nimirum rem servando.

L. Si pignore, 84.  
§ furem. 2.  
D. de Furtis.  
L. Furem. 9.  
D. ad Leg.  
Corn. de Sicariis.

3 Est ergo, ut dixi, præsumtio pro eo, qui furem noctu occidit: sed si forte testes adfuerint, ex quibus constet non fuisse eum, qui furem occidit, adductum in vitæ suæ periculum, jam præsumtio ista cessabit, ac proinde is qui occidit

possit, adeo ut raro quis ad recuperandas res ablatas cogatur adversus Furem fugientem, et armis prædam tueri volentem, suam ipsius vitam defendere. *J. B.*

<sup>4</sup> In lege illa, non suo loco ab Architectis Juris Romani posita, agitur de Lege Aquilia, quæ jubebat reparationem damni dati ab eo, qui servum alienum in furto deprehensum interfecerat; non autem de Lege Cornelia,

secundum quam, ut et legibus XII. Tabularum, nocturnum furem omnimodo occidere licebat. Hoc egregie probavit summus Jurisconsultus Clariss. Noodt, *Probab. Jur.* Lib. i. cap. ix. et *Ad Legem Aquil.* cap. v. quamquam rationes ejus convellere nuper conatus est Vir eruditissimus, J. van de Water, *Obs. Jur. Rom.* Lib. i. cap. 18. *J. B.*

2 The difference depends then on this; that by night there is no testimony to be had; and therefore if the thief be found slain, credit is to be given to him who says that he slew him in defending his life: that is, if he be found with any hurtful instrument. Deut. xxii. 2: *If a thief be found breaking up*, should be translated, *with a weapon for breaking through*. So Jer. ii. 34.

So the law of the Twelve Tables forbids the diurnal thief to be killed, except he defended himself with a weapon. On the other hand, Ulpian teaches that a man who kills a nocturnal thief does it with impunity, if he could not without peril avoid it.

3 And therefore, as I have said, the presumption is in favour of him who kills the nocturnal thief; but if there be testimony by which it appears that the slayer was not in danger of his life, the presump-

homicidii tenebitur. Accedit quod tam diu quam noctu lex duodecim tabularum exegit, ut is qui furem deprehendisset, cum clamore id testificaretur, <sup>5</sup> ut ex Caio discimus, nimirum ut si fieri posset, concursus eo fieret magistratum aut vicinorum ad auxilium et testimonium. Quia vero concursus talis de die facilius habetur quam de nocte, ut notat Ulpianus ad modo indicatum Demosthenis locum, ideo de nocturno periculo asseveranti magis creditur.

L. *Itaque* 4.  
D. ad *Leg.*  
*Aquilianam*,  
§ 1.

p. 236.

Deut. xxii.  
23, et seqq.

4 Cui simile est quod lex Hebræa <sup>u</sup>puellæ de vi illata in agro vult credi, in urbe non item, quia clamore concursum ciere potuit ac debuit. Ad superiora et hoc accedit, quod etiamsi cetera essent paria, tamen quæ nocte accidunt, minus explorari, et qualia quantaque sint cognosci possunt: eoque sunt terribiliora. Lex ergo tam Hebræa quam Romana, id quod caritas suadet, civibus suis præcepit, ne quem interficiant ideo duntaxat quia rem furatur, sed ut id ita demum liceat si is qui rem suam servare voluit ipse in discrimen venerit. Moses Maimonides notavit, permissam privato homini alterius interfectionem non aliter, nisi ut servetur id, quod est irreparabile, ut vita et pudicitia.

XIII. 1 Quid vero jam de lege Evangelica dicemus? idem ab ea permitti, quod permisit lex Moysis; an ut in aliis

<sup>5</sup> Sed clamor ille non exigitur a Duodecim Tab. Additamentum est Gaii Jcti, qui etiam agit tantum de Lege Aquilia. Vide omnino laudati Cl.

Noodtii *Observ.* Lib. 1. c. 15. J. B.

<sup>u</sup> *Puellæ de vi in agro illata vult credi*] Bene id explicat Philo, ut locus frequentioris exempli causa sit positus,

tion ceases, and he is guilty of homicide. Add to this, that the law of the Twelve Tables required him who discovered a thief, either diurnal or nocturnal, to cry out aloud; namely, that neighbours or magistrates might come together for help and testimony. And as such concourse is easier by day than by night, therefore more credence is given in the case of the nocturnal danger.

The case is similar with regard to the Hebrew law, Deut. xxii. 23, which directs that a maid who has been forced in the field is to be believed, but in the city, not, *because she cried not being in the city.*

4 To this is to be added, that in what happens by night, we have no means of knowing the extent of the danger, therefore it is more terrible.

And therefore the Hebrew, like the Roman law, directs that which benevolence recommends, that no one should be slain only because he takes a thing, but only if he who defends it comes into danger. Maimonides says, that the slaying of a man is permitted to a private

rebus perfectior est lege Moysis, ita hic quoque plus eam a nobis exigere? Ego quin plus exigat, non dubito. Nam si tunicam et pallium deseri jubet Christus, et Paulus damnum aliquod injustum tolerari potius quam litigari, quæ incruenta contentio est: quanto magis vult res etiam momenti majoris deseri potius, quam interfici a nobis hominem, Dei effigiem, eodem nobiscum sanguine ortum? Quare si res servari potest, ita ut non videatur periculum esse faciendæ cædis, recte id quidem; sin aliter, omittenda res est: nisi forte talis aliqua res sit, ex qua vita nostra et familiæ nostræ pendeat, quæque judicio recuperari nequeat, forte quia fur sit ignotus, et spes sit aliqua sine cæde rem abituram.

2 Et quanquam hodie omnes ferme, tam Jurisconsulti, quam Theologi, doceant, recte hominem a nobis interfici posse rerum defendendarum causa, etiam extra eos fines, in quibus lex Moysis et Romana id permittit; puta si fur jam re accepta fugiat; tamen quin ea quam protulimus sententia veterum Christianorum fuerit, non dubitamus: nec dubitavit Augustinus, cujus hæc verba sunt: *Quomodo apud divinam providentiam a peccato liberi sunt, qui pro his rebus, quas contemni oportet, humana cæde polluti sunt?* Nimirum in hac materia, ut in aliis multis, cum tempore laxata est dis-

*Soto d. Art. 8.  
Less. dub. xl.  
n. 74.  
Sylv. in Verb.  
Hæc. 2. n. 3.  
Pars. c. 2. de  
Homicid.  
Lem. d. loco.*

*Lib. 1. de Lib.  
Arbitr. 8.*

non quod ex eo solo semper definienda sit controversia. Potest enim, ut libro de specialibus legibus ille disserit, et in urbe aliqua vim pati ocluso ore, et in

agro aliqua consentire in stuprum. (Pag. 788 n, r. *Ed. Paris.*)

<sup>2</sup> *Laxata est disciplina*] Hieronymus in vita Malchi: *Postquam ecclesia*

person only to preserve what, lost, cannot be recovered, life and chastity.

XIII. 1 What shall we say of the Gospel law? That it permits what the Mosaic law permitted; or that in this, as in other cases, the Gospel is more perfect than the Law, and requires more of us? I do not doubt that it does require more; for if Christ direct us to give up our coat and cloak, and Paul, to suffer unjust loss, rather than have recourse to the bloodless contest of law; they would have directed us to give up things of greater value, rather than put to death a man, the image of God, and sprung of the same blood with ourselves. Wherefore if our property can be preserved without peril of slaying, it is well; but if not, it is to be given up: except it be something on which our life and that of our family depends, and which cannot be recovered at law: as for instance, if the thief be unknown, and we have some hope that the matter will end without fatal consequences.

2 And though almost all, both Jurists and Theologians, hold that we may not only kill a man in defense of our property, but beyond

ciplina, et paulatim interpretatio legis Evangelicæ cœpit ad sæculi mores accommodari. Olim in clericis retineri solebat forma veteris instituti: tandem his quoque remissa est hoc nomine censura.

XIV. Quæritur a nonnullis, an non lex saltem civilis, ut jus habens vitæ ac necis, si quo casu permittat furem interfici a privato, simul etiam præstet, ut id ab omni culpa sit liberum. Minime vero id concedendum arbitror. Nam primum lex jus necis non habet in omnes cives ex quovis delicto, sed demum ex delicto tam gravi, ut mortem mereatur. Est autem valde probabilis Scoti sententia, fas non esse quemquam ad mortem damnare, nisi ob delicta, quæ lex per Mosem data morte punivit, addito duntaxat, aut quæ his sunt paria recta æstimatione. Neque enim videtur notitia divinæ voluntatis, quæ sola animum tranquillat, aliunde in hoc negotio tam gravi haberi posse, quam ex illa lege, quæ certe mortis pœnam in furem non constituit. Præterea vero lex nec debet, nec solet jus dare, etiam eos, qui mortem meru-

*capit habere Christianos magistratus, facta est quidem opibus major, sed virtutibus minor.* (Tom. 1. pag. 255 B. ubi tamen paullo aliter verba leguntur). Vide c. *suscipimus*, de homicidio voluntario (in *Decretalibus*) et c. de his, 36. distinct. 50.

*¶ Nisi ob delicta, quæ lex per Mosem data morte punivit*] Contra leges, quæ venantes rusticos morte puniunt, vide

Gregorium Turonensem libro x. c. 10. Johannem Sarisberiensem *Policratici* Lib. 1. cap. iv. (pag. 18. *Ed. Lugd. Bat.* 1639). Petrum Blesensem epistola CXXIX.

*¶ Ita ut ad bellum publicum quoque aptari debeant*] Ammianus Lib. XXIII. (Cap. 1.) *Cum irruentibus armis externis lex una sit et perpetua, salutem omni ratione defendere, nihil renitente vi moris.*

that limit; as, if he be running off with what he has taken; yet we have no doubt that the opinion which we have stated was that of the early Christians. So Augustine. But this discipline has been relaxed by time.

XIV. It is made a question whether the civil law, when it permits us to kill a thief with impunity, does not give us a Right to do so; since the civil law has the Right of life and death. But this is not so. In the first place, the Civil Law has not the Right of life and death in all cases, but only in cases of great crimes. The opinion of Scotus is probable, that we have no right to condemn any one to death except for the crimes so visited in the Mosaic Law, or those which are of the same atrocity. In fact, in so grave a case, we cannot have a knowledge of the divine will which can satisfy our minds, except from that law; which certainly does not punish theft with death. And moreover, the law neither does nor ought to give the Right of privately

erunt, privatim interficiendi, nisi in criminibus valde atrocibus: alioqui frustra instituta esset judiciorum auctoritas. Quare si quando lex impune furem dicit interfici, tollere quidem poenam censenda est, sed non etiam jus dare.

XV. Ex his quæ diximus apparet, duobus modis posse contingere, ut a privatis sine peccato suscipiatur singularis dimicatio: primum, si invasor concedat alteri licentiam dimicandi, alioqui eum occisurus sine dimicatione: deinde, si rex aut magistratus duos mortem meritos inter se committat; quod si fiat, illis quidem licebit arripere spem salutis. At qui id jussit, is minus recte officio functus videbitur, cum satius fuisset, si unius supplicium sufficere videbatur, sorte eligi moriturum.

XVI. Quæ vero dicta a nobis huc usque sunt, de jure tuendi se ac sua, maxime quidem ad bellum privatum pertinent, sed ita ut ad publicum quoque aptari debeant, habita diversitatis ratione. Nam in privato bello jus quasi momentaneum est, et cessat simulatque judicem adiri res patitur.

[De ultimis verbis, ubi in Editione VALESII et GRONOVII legitur, remittente, pro remittente, vide JAC. GOTHOFRED. in *Cod. Theod.* T. V. pag. ult. J. B.] Alexander Imperator oratione ad milites apud Herodianum VI: και τὸ μὲν ἄρχειν ἀδίκων ἔργων οὐκ εὐγνώμονα ἔχει τὴν πρόκλησιν· τὸ δὲ τοῦτε δυχλοῦντας ἀποσεισθαι, ἕκ τε τῆς ἀγαθῆς

συνειδήσεως ἔχει τὸ θαρράλεον, και ἐκ τοῦ μὴ ἀδικεῖν ἀλλ' ἀμύνεσθαι, ὑπάρχει τὸ εὐελπι· Injurias qui prior infert, nihil habet probabilis coloris: at qui sibi molestos arceat, ex bona conscientia sumit fiduciam, bonaque ei spes adest inde, quod injurias non inferat, sed auferat. (Cap. 3, num. 8, 9. Ed. Bæcler.)

putting to death those who deserve death, except in very atrocious crimes; otherwise tribunals would be useless. Wherefore if the law allows us in any case to kill a thief with impunity, it takes away the punishment, but does not give the Right.

XV. It follows, from what has been said, that private persons may join in single combat in two cases; first, if an assailant gives us the choice of single combat, being ready to kill us otherwise without combat; and secondly, if the king or magistrate set two condemned persons to fight in such a combat; in which case they may take their chance of surviving. But he who gives such command does not seem to do his duty well; for if the death of one was enough, it was better that he who should die should be chosen by lot.

XVI. What has been said of the right of defending ourselves and our property, more peculiarly relates to private war, but so that it may be adapted to public war, attending to the diversity of conditions. For in private war the Right is momentary, and ceases as soon as the



At publicum, quia non oritur, nisi ubi non sunt aut cessant judicia, tractum habet, et perpetuo fovetur accedentibus novis damnis et injuriis. Præterea in bello privato ferme defensio mera consideratur: at publicæ potestates cum defensione et ulciscendi habent jus. Unde illis licet prævenire vim non præsentem, sed quæ de longo imminere videatur, non directe (id enim injustum esse supra docuimus) sed indirecte ulciscendo delictum cœptum jam, sed non consummatum: de quo agendi erit alibi locus.

XVII. Illud vero minime ferendum est, quod quidam tradiderunt, jure gentium arma recte sumi ad imminuendam potentiam crescentem, quæ nimium aucta nocere posset. Fateor in consultationem de bello et hoc venire, non sub ratione justæ, sed sub ratione utilis: ut si ex alia causa justum sit bellum, ex hac causa prudenter quoque susceptum judicetur: nec aliud dicunt, qui in hanc rem citantur auctores. Sed ut vim pati posse ad vim inferendam jus tribuat, ab omni æquitatis ratione abhorret. Ita vita humana est, ut plena securitas nunquam nobis constet. Adversus incertos metus a divina providentia et ab innoxia cautione, non a vi præsidium petendum est.

Alb. Gent. l.  
14.

Bald. l. lib. de  
Rer. Divis.

Alb. Gent. l.  
13.  
Castr. v. de  
Justitia.

XVIII. 1 Nec minus illud displicet, quod docent, jus-

<sup>6</sup> Immo Lacedæmonii Thebanis. De æqua satisfactione: verum de vindicta, inde non agit heic Aristides de oblata quam Thebani ipsi sumserant, in præ-

judge can be referred to. But public war does not arise, except when the judge's authority does not exist, or ends, has a prolonged character, and is constantly sustained by the accession of new losses and injuries. Besides in private war, defense alone is considered; but the public powers have the right not only of defending, but also of obtaining satisfaction. Hence they may prevent force not present, and threatening from afar; not directly (for that, as we have taught, is unjust,) but indirectly, by taking satisfaction for a delinquency begun, but not consummated\*: of which we shall treat elsewhere.

XVII. There is an intolerable doctrine in some writers, that by the Law of Nations we may rightly take arms against a power which is increasing, and may increase, so as to be dangerous. Undoubtedly, in deliberating of war, this may come into consideration, not as a matter of justice, but as a matter of utility; so that if the war be just on

\* The broad differences marked in this article between public war and private self-defense shew how improperly the latter is called *war*. W. W.

tam esse defensionem etiam eorum, qui bellum promeriti sunt, quia scilicet pauci contenti sunt tantundem reponere vindictæ, quantum acceperunt injuriæ. Nam metus ille rei incertæ jus ad vim dare non potest: unde nec reus criminis jus habet publicis ministris capere se volentibus per vim resistendi, ob metum ne plus æquo puniatur.

2 Sed qui in alium peccavit, debet primum ei quem læsit offerre satisfactionem viri boni arbitrato: ac tum demum pia erunt ejus arma. Sic Ezechias, cum fœdere non stetisset, <sup>2 Reg. xviii. 7, 14 et xix.</sup> quod cum rege Assyrio majores ejus pepigerant, bello petitus fatetur culpam, et regi permittit arbitrium multæ: idque cum fecisset, et postea iterum bello laceraretur, fretus bona conscientia vim hostium sustinuit, et Deum habuit faventem. Pontius Samnis post res Romanis redditas, deditum belli auctorem, *Expiatum*, inquit, *est, quicquid ex federe rupto irarum in nos coelestium fuit.* <sup>Liv. ix. 1.</sup> *Satis scio, quibuscunque Diis cordi fuit subigi nos ad necessitatem dedendi res, iis non fuisse cordi tam superbe a Romanis federis expiationem speretam.* Mox: *Quid ultra tibi, Romane, quid federi, quid Diis arbitriis federis debeo? Quem tibi tuarum irarum, quem meorum suppliciorum judicem feram? Neminem, neque populum, neque privatam fugio.* Sic cum Thebani omnia æqua obtulissent <sup>6</sup>Lacedæmoniis, ii autem ultra

lio Leucrio, ubi victores fuerant. Vide *Græc. Lib. vi. cap. v. § 33. et seqq.* locum, pag. 93. Tom. II. *Ed. Paul. J. B.*  
Steph. et adde Xenophontem, *Hist.*

other accounts, it may, on this account, be prudent; and this is what the arguments of authors come to. But that the possibility of suffering force gives us the right of using force, is contrary to all notion of equity. Such is human life, that we are never in complete security. We must seek protection against uncertain fears from Divine Providence, and from blameless caution, not from force.

XVIII. 1 Nor do we agree that those who have deserved war, have a Right to defend themselves; namely, because few persons are content with taking satisfaction to the mere extent of the injury. For that fear of an uncertainty cannot give a Right to force: and so, a person accused of a crime has not a right of forcibly resisting the ministers of justice, for fear of being over-punished.

2 He who has injured another ought first to offer him satisfaction at the arbitration of a good man; and if this fail, his warfare will be

tenderent, <sup>7</sup>bonam causam ab his ad illos transiisse ait Aristides Leuctrica prima.

<sup>7</sup> *Bonam causam ab his ad illos transiisse*] De principe Chalepi, qui pacem et residua tributorum obtulerat Romano Argyropolo Imperatori, vide Zonaram (Lib. xvii. cap. xi.) simile de Cruciferis in Cromero libro xvii. (pag. 393. *Ed. Basil. 1555*) de Helvetiis, qui Carolo Burgundo de curru ovium pelibus onusto, ademtoque mercatoribus, satisfactionem obtulerant, vide Philip-

pum Cominseum libro vii. [Non ipsi Helvetii curram mercatoribus ademto, sed curram, qui Helvetii cujusdam mercatoris erat, Comes Romondius apprehendi jussit: unde ortum bellum Helvetiorum cum eo, et postea, cum Carolo Audace, hoc obtentu adversus illos arma moventis. Vide pag. 66. et 67. Versaionia Sleidani, qua usus Auctor noster. *Ed. Weck. J.B.*]

---

righteous. So Hezekiah acted, 2 Kings xviii. 7, 14, and xix. 1. So Pontius the Samnite urged that this was all that could be required. [See Livy.] So when the Thebans had done this, Aristides says that justice had passed over to their side.

---

## CAPUT II.

### DE HIS, QUÆ HOMINIBUS COMMUNITER COMPETUNT.

- |  |   |
|--|---|
| <p>I. <i>Ejus quod nostrum est divisio.</i></p> <p>II. <i>Proprietatis exordium et progressus.</i></p> <p>III. <i>Quædam propria fieri non posse, ut mare sumtum pro suo integro aut præcipuis partibus, et quare.</i></p> <p>IV. <i>Sola non occupata cedere singulis occupantibus, nisi per universitatem a populo occupata sint.</i></p> <p>V. <i>Feras, pisces, aves cedere occupanti, nisi lex obstet.</i></p> <p>VI. <i>In res proprias factas jus hominibus competere eis utendi in tempore necessitatis et unde id veniat.</i></p> <p>VII. <i>Obtinere id, nisi necessitas aliter sit vitabilis.</i></p> <p>VIII. <i>Nisi par sit necessitas in possidente.</i></p> <p>IX. <i>Adjunctum esse onus restituendi rem, cum restitui poterit.</i></p> <p>X. <i>Exemplum hujus juris in bellis.</i></p> <p>XI. <i>In res proprias factas jus hominibus competere ad utilitatem, qua nihil alteri deccedit.</i></p> | <p>XII. <i>Hinc jus in aquam profluentem.</i></p> <p>XIII. <i>Jus transeundi terra et amnibus, quod explicatur.</i></p> <p>XIV. <i>An mercibus transeuntibus vectigal possit imponi.</i></p> <p>XV. <i>Jus morandi ad tempus.</i></p> <p>XVI. <i>Jus habitandi his competens, qui sedibus suis expulsii sunt, sub imperio quod reperitur.</i></p> <p>XVII. <i>Jus habendi loca deserta: quod quomodo intelligendum.</i></p> <p>XVIII. <i>Jus ad actus, quos vita humana desiderat.</i></p> <p>XIX. <i>Ut ad emenda necessaria.</i></p> <p>XX. <i>Non etiam ad res suas vendendas.</i></p> <p>XXI. <i>Ad quærenda matrimonia: quod explicatur.</i></p> <p>XXII. <i>Jus ea faciendi, quæ promiscue extraneis permittuntur.</i></p> <p>XXIII. <i>Quod intelligendum, si quid permittatur quasi ex jure naturali, non ut ex beneficio.</i></p> <p>XXIV. <i>An licitus sit contractus cum populo, ut is fruges suas, eis, quibuscum jam contraxit, non aliis vendat.</i></p> |
|--|---|

I. **S**EQUITUR inter belli causas injuria facta, et primum adversus id, quod nostrum est. Est autem nostrum aliud communi hominum jure, aliud nostro singulari. Ab eo, quod hominibus commune est, incipiamus. Hoc jus aut

---

#### CHAPTER II. *Of the Common Rights of Mankind.*

I. We treat now of the Causes of War; and first, of Injury done us with respect to what is ours. Some things are ours by the Common Right of mankind; others by our own Special Right. We will begin

directe est in rem corporalem, aut ad actus aliquos. Res corporales aut vacuæ sunt a proprietate, aut jam aliquorum propriæ. Res, quæ a proprietate vacant, aut tales sunt, ut propriæ fieri nequeant, aut ut possint. Quo rectius hoc intelligatur, noscendum est proprietatis, <sup>1</sup>quod dominium jurisconsulti vocant, exordium.

Gen. I. 29, 30.  
Ex. 2.

Lib. xlii. l.

Cap. 30.

II. 1 Deus humano generi generaliter contulit jus in res hujus inferioris naturæ statim a mundo condito, atque iterum mundo post diluvium reparato. <sup>a</sup>*Erant, ut Justinus loquitur, omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset.* Hinc factum ut statim quisque hominum ad suos usus arripere posset, quod vellet, et quæ consumi poterant consumere. Ac talis usus universalis juris erat tum vice proprietatis. Nam quod quisque sic arripuerat, id ei eripere alter nisi per injuriam non poterat. Similitudine hoc intelligi potest ea, quæ est apud Ciceronem *de Finibus* III.

<sup>1</sup> De tota hac materia consule PUFENDORFIUM, *De Jure Nat. ac Gent.* Lib. IV. cap. 4. cum Notis nostris, præsertim Editionis alterius, ubi res longe plenius et accuratius pertractatur. J. B.

<sup>a</sup> *Erant omnia communia et indivisa omnibus*] Ejus vestigium mansit in Saturnalibus.

<sup>b</sup> *Theatrum cum commune sit*] Seneca *de Beneficiis* VII. c. xii. *Equestria omnium equitum Romanorum sunt: in illis tamen locus meus fit proprius, quem occupavi.*

<sup>c</sup> *Ex simplicitate erimia*] Horatius:

Campestres melius Scythiæ,  
Quorum plaustra vagas rite trahunt domos,  
Vivunt, et rigidi Getæ,  
Immetata quibus jugera lberas  
Fruges et Cererem ferunt,  
Nec cultura placet longior annua,  
Defunctumque laboribus  
Equali recreat sorte vicarius.  
(Lib. III. Od. xxiv. 9).

<sup>d</sup> *Esseni*] Et ab his orti Pythagoristarum. Vide Porphyrium, (*vit. Pythag.* § 20). Diogenem Laertium, (VIII. 10). Gellium, I. 9. [Vide Auctoris *Epist.* I. part. 552. ubi hanc suam conjecturam rationibus firmare nititur. Quod quidem, sive verum, sive falsum, parum ad

with the Common Right of mankind. This Right either directly regards corporal things, or certain acts. Corporal things are either unappropriated, or the property of some one. Unappropriated things are either such as cannot be appropriated, or such as can. Hence we must consider the origin of Property, or Ownership, which the jurists call *Dominium*.

II. 1 God gave the human race generally a right to the things of a lower nature, at the Creation, and again, after the Deluge. Every thing was common and undivided, as if all had one patrimony. Hence each man might take for his use what he would, and consume what he could. Such a Universal Use was then a Right, as Property is now. What each one had taken, another could not take from him by force without wrong. Cicero compares this state of things to the theatre, which

<sup>b</sup> *Theatrum cum communitate sit. recte tamen dicitur quodammodo esse eum locum, quem quisque occupat.*

Neque is status durare non potuit. si autem in magna quadam simplicitate persistissent homines. non viderentur inter se in mutua quadam eximia caritate. Eorum alteram communitationem scilicet ex simplicitate eximia. videtur inter in quibusdam Americæ populis, qui per sæcula multa sine incommodis in eo more persistenter: alteram verò communitationem nimirum ex caritate, exhibuerunt olim Esseni. deinde Christiani, qui Hierosolymis primi existerunt, ac nunc quoque non pauci, qui vitam degunt asceticam. Simplicitas, in qua primi homines sunt conditi, argumentum præbuit naturæ. Erat in illis ignorantia magis vitiorum, quam cognitio virtutis: ut de Scythiis loquitur Trogus. *Vetustissima mortalium, inquit Tacitus, nulla adhuc mala libidine sine prole, sodere, eoque sine pena aut coercitionibus agunt.* Apud Macro-

rem facit. J. B.]

\* Primi homines] Adæm typus humani generis. Vide Origenem contra Celsum. [Lib. vii. § 28.] Neque nihil huc pertinet, quod Tertullianus dixit Libro de Animis: *Naturale enim rationale credendum est, quod anima a primordio sit ingensita, a rationali videlicet auctore. Quid enim non rationale, quod Deus jussu quoque ediderit, nedum id quod proprie efflatu suo emiserit? Irrationale autem posterius intelligendum est, ut quod acciderit ex serpentis instinctu, ipsum illud transgressionis admissum, atque exinde*

insulerit, et conduxerit in animis adinstar jam naturalitatis, quæ statim in primordio nature accidit. (Cap. 16.)

\* *Nulla adhuc mala libidine.* Seneca de iisdem epistola x. ignorantie veterum innocentes erant. Deinde locutus de justitia, prudentia, temperantia, fortitudine, addit: *Omnes his virtutibus habebat similia quosdam rudis vita.* Josephus: *μὴδεμιᾷ ἐπιζόμενοι ψυχῆς φθορῆς.* Nullis curis turbidum habentes animum. (Antiq. Jud. Lib. 1. cap. i. § 4. pag. 8. Ed. Hudson. Anst. ubi legitur ζαιόμενοι).

though it be common, yet when a man has taken any place, it is his.

And this state might have continued, if men had remained in great simplicity, or had lived in great mutual good will. One of these two conditions, a community of goods arising from extreme simplicity, we may see in some of the peoples of America, who have lived for many generations in that state without inconvenience. The other, a community of goods from mutual charity, was exhibited formerly among the Essenes, and then among the first Christians at Jerusalem, and now in many places among Ascetics. The simplicity of the first races of men was proved by their nakedness. They were rather ignorant of vices than acquainted with virtue: as of the Scythians. So Tacitus, Macrobius, and Paul. Their business was the worship of life was a sym-

2 Ad Rom. Scip. 10.

Sup. iii. 94. 2 Cor. xi. 3.

Prov. iii. 18. Philo de M'und. cre. p. 36 D. Apocal. xxii. 2.

bium est: *Primum inter homines mali nescia et adhuc astutiae inexperta simplicitas*: hæc simplicitas <sup>ε</sup> ἀφθαρσία videtur dici sapienti Hebræo, Paulo apostolo ἀπλότης, quam opponit τῇ πανουργίᾳ, vāfræ calliditati. Negotium erat illis unicum Dxi cultus, <sup>h</sup> cuius symbolum arbor vitæ, ut Hebræi veteres explicant, assentiente Apocalypsi. Vivebant autem facile ex his, <sup>i</sup> quæ sine industria sponte sua terra proferebat.

De M'und. Opif. p. 36 N. Eccles. vii. 30.

p. 68 A.

2 Verum in vita hac simplice et innocente non perstiterunt homines, sed animum applicuerunt ad artes varias, quarum symbolum erat <sup>k</sup> arbor scientiæ boni et mali, id est, earum rerum, quibus tum bene tum male uti licet: φρόνησιν μέσσην vocat Philo. Huc respiciens Salomo, *Deus*, inquit, *creavit hominem rectum*, id est, *simplicem*, *sed ipsi quæsierunt sibi cogitationes multas*; ἔρρεπον εἰς πανουργίαν, ut dicto loco Philo loquitur. Dion Prusæensis oratione vi. ἀλλὰ τὴν πανουργίαν τοῖς ὕστερον καὶ τὸ πολλὰ εὐρίσκειν καὶ μηχανᾶσθαι πρὸς τὸν βίον οὐ πάνυ τι συνενεργεῖν. οὐ γὰρ πρὸς ἀνδρείαν, οὐδὲ δικαιοσύνην, χρῆσθαι τῇ σοφίᾳ τοὺς ἀνθρώπους, ἀλλὰ πρὸς ἠδόνην. *His qui primos secuti sunt homi-*

<sup>ε</sup> *Αφθαρσία videtur dici sapienti Hebræo*] Sic et Paulus Ephes. vi. 24. qui et ἀδιαφθορίαν dixit Tit. ii. 17. [Auctor in Adnotationibus suis ad V. et N. Test. voces has aliter exponit. Vide, si tanti est. *J. B.*]

<sup>h</sup> *Cujus symbolum arbor vitæ*] Sanctitas superior Rabbiniis: ἐνθεος σοφία, divina sapientia, Arethæ ad Apocalypsin. De Paradiso vide Ecclesiastici caput xl. 17. et quatuor fluminibus Paradisi eundem librum xxiv. 25. et sequentibus.

<sup>i</sup> *Quæ sine industria sponte sua terra proferebat*] Vide egregium hac de re locum libro i. (cap. 2) Varronis *de Rustica*, ex Dicearcho: et confer quæ

ex eodem Dicearcho habet Porphyrius *de non Essu Animalium* iv. (Pag. 342, et seqq.)

<sup>k</sup> *Arbor scientiæ boni et mali*] Josephus (*Antiq. Jud.* Lib. i. cap. 1. § 4. pag. 7): τὸ φυτόν ὀξύτητος καὶ διανοίας ὑπήρχεν· *quæ arbor erat solertiæ et intelligentiæ*. Telemachus apud Homerum (*Odysse.* xx. 309):

καὶ οὐδὲ ἕκαστα,  
Ἐσθλά τε καὶ τὰ χεῖρα. πάρος ὄπι νήπιος  
ἦε.

omnia novi,

Quæ bona, quæ mala sunt, nec sum jam parvus  
ut ante.

Zenoni Cittiensis prudentia, scientia bonorum, et malorum, et mediolorum. Est

Revelation xxii. 2). They lived easily on what the earth, without labour, spontaneously produced.

2 But men did not continue in this simple and innocent life, but applied their minds to various arts, of which the symbol was the Tree of the Knowledge of good and evil; that is, of those things which may be used ill or well. So Philo, Solomon, Dio Prusæensis. [See.] The oldest arts, agriculture and pasture, appeared in the first brothers (Cain and Abel); not without a division of possessions already shew-

nibus callidatem <sup>1</sup>variosam in vias ventu non vultum  
fuisse conducibilem. Insuper enim non vultum nos tunc ad  
fortitudinem ac justitiam <sup>2</sup>inimicis in <sup>3</sup>concordiam. <sup>4</sup>Simul-  
simus artes agriculturae et <sup>5</sup>mercatorie et <sup>6</sup>hominum instructione <sup>7</sup>con-  
ruerunt; non sine aliis <sup>8</sup>virtutibus <sup>9</sup>interdictione. <sup>10</sup>Et simulque  
diversitate consuetudinis, <sup>11</sup>etiam <sup>12</sup>omnes: <sup>13</sup>et <sup>14</sup>omnes <sup>15</sup>non <sup>16</sup>non  
lorum consortio <sup>17</sup>concordiam <sup>18</sup>concordiam. <sup>19</sup>Non est  
est, violentum, quale est <sup>20</sup>est. <sup>21</sup>Non <sup>22</sup>est. <sup>23</sup>Non  
<sup>24</sup>Mundo per <sup>25</sup>delirium <sup>26</sup>peripat. <sup>27</sup>Non <sup>28</sup>est. <sup>29</sup>Non  
cupido voluptatis, <sup>30</sup>est <sup>31</sup>est. <sup>32</sup>Non <sup>33</sup>est. <sup>34</sup>Non

3 Praecipue vero concordiam <sup>1</sup>inimicis <sup>2</sup>concordiam <sup>3</sup>concordiam. <sup>4</sup>Non  
bitio, <sup>5</sup>cujus signum <sup>6</sup>est. <sup>7</sup>Non <sup>8</sup>est. <sup>9</sup>Non <sup>10</sup>est. <sup>11</sup>Non  
partito possederunt. Sed <sup>12</sup>omnes <sup>13</sup>omnes <sup>14</sup>omnes <sup>15</sup>omnes <sup>16</sup>omnes  
mansit non pecorum, sed <sup>17</sup>est. <sup>18</sup>Non <sup>19</sup>est. <sup>20</sup>Non  
quia tanta erat in exiguo <sup>21</sup>est. <sup>22</sup>Non <sup>23</sup>est. <sup>24</sup>Non  
ut sine incommodo <sup>25</sup>est. <sup>26</sup>Non <sup>27</sup>est. <sup>28</sup>Non

Ne signare quidem sine pariter limine campum  
Fas erat.

Verg. Georg.  
1. 1. 26.

Donec, aucto ut hominum in pecuniam numero, passim dante

id apud Diogenem Laertium Lib. vii. § 93). Plutarchus de Commodis Ni-  
tistis: *et deinde, et tunc cunctis civitate-  
batur oia bonis phoqera, et ipse t  
dit' hactenq' dperis i'pzas, oia ay-  
oas kal kaxas, all' ayabos nicos  
et i'pzas oias; Quid nocbit, si ab-  
latis malis nulla erit prudentia, pro ea  
autem alienam habemus virtutem, qua  
non bonorum ac malorum, sed solum  
bonorum sit scientia?* (Pag. 1061 A.  
Tom. II.)

<sup>1</sup> Variasque ad vitam reperta] Lato  
hoc explicat Seneca epistola xc. quem  
lege, et Diemarchum apud dictos jam  
scriptores.

<sup>2</sup> Vita genus giganteum] Seneca

Naturalium iii. in fine: *continetis pa-  
viter feris, in quorum homines ingenia  
transierunt.* (Cap. 30.)

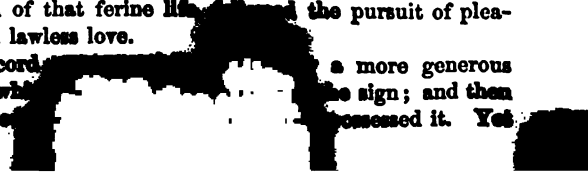
<sup>3</sup> Mundo per delirium peripato, pro  
ferius illa vita succurrit cupido volupta-  
tis] Seneca dicto loco: *illis quoque in-  
nocentia non durabit, nisi dum novi sunt.*  
(Quest. Nat. iii. 20.)

<sup>4</sup> Cui inierit vinum, unde et illiciti  
amores] Praemissaque summum ebrietatis  
libido portentosa ac jucundum nefas.  
Seneca ibidem. [Haec verba non sunt  
Senecae: verum Plinii, *Hist. Nat.* Lib.  
xiv. c. 22. pag. 728. Tom. i. Edit. Hard.  
in fol. J. B.]

<sup>5</sup> Ambitione impulsos fuisse homines  
ad extruendam Turrim Babyloniam,

ing itself, and even not without bloodshed. And at length when the  
good were corrupted by intercourse with the bad, came the life of the  
Giants, that is, times of violence. And when the world was cleared by  
the Deluge, instead of that ferine life, followed the pursuit of plea-  
sure, with wine and lawless love.

3 But the concord <sup>1</sup>est. <sup>2</sup>Non <sup>3</sup>est. <sup>4</sup>Non <sup>5</sup>est. <sup>6</sup>Non  
vice, ambition: of <sup>7</sup>est. <sup>8</sup>Non <sup>9</sup>est. <sup>10</sup>Non  
different men divide <sup>11</sup>est. <sup>12</sup>Non <sup>13</sup>est. <sup>14</sup>Non





Gen. xxi.

Mari Maro  
15.

non in gentes ut ante, sed in familias dividi cœperunt. <sup>2</sup> Puteos vero, rem in siticulosa regione valde necessariam, nec multis sufficientem, occupando quisque suos fecere. Hæc sunt, quæ ex sacra historia docemur, satis convenientia cum his, quæ philosophi et poëtæ de primo statu rerum communium et postea secuta rerum distributione dixerunt, quorum testimonia alibi a nobis producta sunt.

4 Hinc discimus, quæ fuerit causa, ob quam a primæva communione rerum primo mobilium, deinde et immobilium discessum est: nimirum quod, cum non contenti homines <sup>3</sup> vesci sponte natis, antra habitare, corpore aut nudo agere, aut corticibus arborum ferarumve pellibus vestito, vitæ genus exquisitius delegissent, industria opus fuit, quam singuli rebus singulis adhiberent; quo minus autem fructus in commune conferrentur, primum obstitit locorum, in quæ homines discesserunt, distantia, deinde justitiæ et amoris defectus, per quem fiebat,

non ita certam est. Quæ de re videri possunt Origines Babylonice Eruditissimi PERIZOSII, cap. xiii. *J. B.*

<sup>2</sup> Puteos vero] De puteis ad Oasim inter multos communibus vide Olympiodorum apud Photium. (Cod. 80. pag. 193. *Edit. Rothomag.*)

<sup>3</sup> Vesci sponte natis, antra habitare, corpore aut nudo agere, aut corticibus arborum ferarumve pellibus vestito] Qualem vitam Scritefannorum nobis accurate describit Procopius Gothicorum II. (c. 15.) Adde Plinium XII. Procœm. et Vitruvium II. c. I.

<sup>2</sup> Nullum pactum hæc intervenisse, neque etiam necessarium fuisse, fuso probavimus in Notis nostris Gallicis ad PUFFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. IV. § 4, et seqq. *J. B.*

<sup>3</sup> Ut per occupationem] Vide quæ hæc de re ex Gemara et Alcorano nobis protulit honos Britannicæ Seldenus in *Thalassocratico.* (See Mari Clauso, Lib. I. cap. 4, pag. 24. *Ed. Londin.* 1636).

<sup>4</sup> Censeri debet inter omnes commisitæ, ut quod quisque occupasset, id propriam haberet] Cicero: *ex quo quia sumum cujusque fit eorum quæ natura fue-*

still there remained among neighbours a community, not of their flocks and herds, but of their pastures; for there was enough for all for a time: until, cattle increasing, the land was divided, not according to nations as before, but according to families. And some made and occupied their own wells, things most necessary in a thirsty region, and not sufficing for many. This is the account of the sacred history, sufficiently agreeing with the account given by philosophers and poets.

4 There we learn what was the cause why men departed from the community of things, first of moveables, then of immoveables: namely, because when they were not content to feed on spontaneous produce, to dwell in caves, to go naked, or clothed in bark or in skins, but had sought a more exquisite kind of living, there was need of industry, which particular persons might employ on particular things. And as

ut nec in labore, nec in consumptione fractum, quæ debet, æqualitas servaretur.

5 Simul discimus, quomodo res in proprietatem iverint: non animi actu solo; neque enim scire alii poterant, quid alii summo esse vellent, ut eo abstinerent; et idem velle plures poterant: sed pacto quodam aut expresso, ut per divisionem, aut tacito, ut per occupationem: simulatque enim communio displicuit, nec instituta est divisio, censeri debet inter omnes convenisse, ut, quod quisque occupasset, id proprium haberet. <sup>1</sup> *Concessum*, inquit Cicero, *sibi ut quisque malit, quod ad vitæ usum pertinet, quam alteri acquiri, non repugnante natura*. Cui addendum illud Quintilianii: *Si hæc conditio est, ut quicquid in usum hominis cessit, proprium sit habentis, profecto quidquid jure possidetur, injuria auferatur*. *Et veteres cum Cererem legiferam, et sacra ejus Theopropoia dixerunt, hoc significabant ex agrorum divisione existisse novi cujusdam juris originem.*

*rant communia, quod cuique obtigit, id quisque teneat. (De Off. 1. 7). Quod similitudine illustrat. (Ibid. Lib. III. c. 10.) a Chrysippo reperta de studio, ubi currendo licet vincere adversarium, non eum detrudendo. Scholiastes ad artem poeticam Horatii (Vers. 128. pag. 627. Edit. Crug.): quemadmodum domus aut ager sine domino communis est: occupatus vero jam proprius fit. Varro in Age Modo: Terra cultura causa attributa olim particulatim, ut Etruria Tuscia, Samnium Sabellia. [Apud PHYLAGTRIUM in Virg. Georgic. II. 167].*

<sup>1</sup> *Concessum, sibi ut quisque malit, quod ad vitæ usum pertinet, quam alteri acquiri, non repugnante natura*] Solon: *Χρηματα δ' ἰσότητι μὲν ἔχου, εὐνομίᾳ τε καὶ ἀρετῇ.*

*Οὐκ εὐνομίᾳ.*

Divitias habuisse velim, sed non bene parvas Non cupiam.

(Vers. 7, 8. *Eleg.*) Cicero *Officiorum* 1: *Nec vero rei amplificatio nemini nocens vituperanda est, sed fugienda semper injuria.* (Cap. 8).

<sup>2</sup> *Ex agrorum divisione existisse novi cujusdam juris originem*] *Postquam ex*

to the common use of the fruits of the earth, it was prevented by the dispersion of men into different localities, and by the want of justice and kindness which interfered with a fair division of labour and sustenance.

5 And thus we learn how things became Property; not by an act of the mind alone: for one party could not know what another party wished to have for its own, so as to abstain from that; and several parties might wish for the same thing; but by a certain pact, either express, as by division, or tacit, as by occupation: for as soon as community was given, if no division was not instituted, it must be supposed to be the result of agreement among all, that what each had should be as his own. So Cicero, Quintilian. And the same is the sense of the Author of Laws, and her

III. 1 His positis dicimus, mare sumtum aut sub ratione integri, aut sub ratione præcipuarum partium, in proprium jus abire non posse: quod, quia de privatis quidam concedunt, non de populis, probamus ex morali primum ratione: quia causa, ob quam a communi discessum est, hic cessat. Est enim tanta maris magnitudo, ut ad quævis usum omnibus populis sufficiat, ad aquam hauriendam, ad piscatum, ad navigationem. Idem dicendum esset de aëre, si quis ejus usus esse posset, ad quem terræ usus non esset necessarius, ut est <sup>2</sup>ad aucupia; unde illa legem accipiunt ab eo, qui in terra imperium habet.

2 Nec aliud censendum de Syrtibus, ubi nihil est quod cultum ferat, et usus unicus petendarum inde arenarum exhauriri nequit. Est et naturalis ratio, quæ mare considerata, ut diximus, proprium fieri vetat: quia occupatio non procedit nisi in re terminata: unde Thucydides terram vacuam vocat ἀόριστον et Isocrates terram ab Atheniensibus occupatam τὴν ὑπ' ἡμῶν ἀφορισθεῖσαν. Liquida vero quia per se non terminantur (τὸ ὑγρὸν ἀόριστον οἰκεία ὄρεα, inquit Aristoteles) occupari nequeunt, nisi ut contenta in re alia: quomodo lacus et stagna occupata sunt, item flumina quia ripis

Lib. I. 120.

Pansy. p. 48 A.

De Gener. II.  
2.

agrorum discretionem nata sunt jura. Ita Servius ad illud in quarto Æneidos: *Legifere Cereri.* (Vers. 58.)

<sup>4</sup> Ratio illa per se contrarium potius probat. Vide quæ diximus in PUTENDORF. *De Jur. Nat. et Gent. Lib.*

IV. cap. v. § 3, 4. et *De Offic. Hom. et Civ. Lib. I. cap. XII. § 4.* ultimarum utriusque Versionis Editionum. *J. B.*

<sup>2</sup> *Ad aucupia*] Et habitandi jus. Tam soli quam cœli mensura faciendâ est, ait Pomponius l. si opus. 21. § 2 D.

festival *Thesmophoria*, *Law-bearing*, had this meaning; that from the division of land arose a new origin of Rights.

III. 1 This being laid down, we say that the sea, whether taken as a whole, or as to its principal parts, could not become property. And as some concede this with regard to private persons, but not with regard to peoples, we prove it first from a moral reason; namely, that the cause why community was given up, here ceases. For the magnitude of the sea is so great that it is sufficient for all peoples for every use, either of drawing water, fishing, or navigation. The same might be said of the air, if there was any use of it to which the use of the earth is not also necessary, as in bird-catching it is; and therefore this employment is governed by the ownership of the land.

The same is true of sandy bays, where there is nothing which can be cultivated, and the only use, procuring sand, is inexhaustible.

2 There is also a natural reason which prevents the sea from being

tenentur. *Mare* terra non continetur, par terra est. terra magis unius terram mari contineri dicitur. *οὐκ εἰσκαπὸν οὐρανὸν ἕως τῆς γῆς περιβεβληθῆναι.* quæ Aristotelis verba apud Philostratum. Sulpicius Apollinarius apud Livium. *Quid potest esse terra oceanum esse, cum undique oceanus circumscribit omnes terras, et ambiat? Mare: Quia non omnes terras circumferiam et undique versum circumferat, sed citra eum est, sed undarum illius ambitu terra circumconvallatis in medio ejus sunt omnia, quæ intra esse quæ inclusa sunt.* M. Acilius Consul in oratione ad M. C. C. apud Livium: *Occano, inquit, qui orbem terrarum circumperfrinit.* In Senecæ suasoriis dicitur oceanus *terrarum omnium custodiam* Lucano unda *mundum circumperfrinit.* Nec fingenda divisio: nam cum primum terra a mari occupatum cognitum erat mare sui maxima partes: atque ut terra occupata fingi modus potest, quo gentes adeo dispartita esse dicerentur, ut venirent.

3 Ideo, quæ communia omnium fuerunt et a prima divisione divisa non sunt, ea non jam divisione, sed occupacione transeunt in jus proprium, nec dividuntur nisi per occupacionem propria esse cœperunt.

*quod vi aut clam.* Adde legem 83. seu penultimam d. *pro socio.*

<sup>3</sup> Vide contra, præter SELDENUM, in opere jam laudato, Lib. 1. cap. 22. Amplissim. BYNCKERSHOEK. *Diss. de Dominio Maris*, cap. ix. J. B.

<sup>1</sup> *Nisi in re terminata.* Id est, quæ per occupationem occupata non est, sed occupata est, ut dicitur in *De Rebus Occupatis*.

<sup>2</sup> *Terra magis.* Id est, quæ magis occupata est, ut dicitur in *De Rebus Occupatis*, §. 37.

made property; namely, because occupation can only be applied to a thing which is bounded. [Thucydides. *Isoterates* — *terrae tantum occupantur, ut seipsas unbounded, as Aristotle says; and cannot be occupied except as they are contained in something else; as lakes and ponds are occupied, and rivers as far as their banks go. But the sea is not contained by the land, being equal to the land or greater, so that the ancients say the land is bounded by the sea.* Apollonius Sulpicius Apollinarius, Livy, Seneca, Lucan.] Nor are we to begin a division of the sea: for when the earth was first divided, the sea was for the most part unknown; and therefore we cannot imagine any way in which distant nations could come as to such divisions.

3 Therefore those things which were common to all, and which were not divided in the first division, but by occupation, become property only after they have been occupied.

æquitate naturali recesserit. Nam si scriptæ etiam leges in eum censum trahendæ sunt quatenus fieri potest, multo magis mores, qui scriptorum vinculis non tenentur.

2 Hinc primo sequitur, in gravissima necessitate reviviscere <sup>7</sup>jus illud pristinum rebus utendi, tanquam si communes mansissent: quia in omnibus legibus humana, ac proinde et in lege dominii, summa illa necessitas videtur excepta.

Lib. II. § 2.  
D. de l. Rhod.

Lib. III. § 7.  
D. de Incend.  
Lib. XXIX.  
§ 2. D. ad  
Leg. Aquil.

3 Hinc illud, ut in navigatione, si quando defecerint eibaria, quod quisque habet, in commune conferri debeat. Sic et defendendi mei causa vicini ædificium orto incendio dissipare possum: et funes aut retia discindere, in quæ navis mea impulsa est, <sup>c</sup>si aliter explicari nequit. Quæ omnia lege civili non introducta, sed exposita sunt.

Thom. II. 2:  
Invi. 7.  
Covarr. esp.  
Peccat. p. 2.  
§ 1. Soto, v.  
q. 2. art. 4.

4 Nam et inter Theologos recepta sententia est, in tali necessitate, si quis quod ad vitam suam necessarium est, sumat aliunde, eum furtum non committere: cujus definitionis non hæc causa est, quam nonnulli adferunt, quod rei dominus ex caritatis regula rem egenti dare tenetur, sed quod res omnes in dominos distinctæ, cum benigna quadam receptione primitivi juris videantur. Nam si primi divisores interrogati fuis-

<sup>7</sup> Confer PUFENDORF. *De Jure Nat. et Gent.* Lib. II. cap. vi. § 5, 6, 7. ubi argumentum istud adcuratius pertractatur. J. B.

<sup>c</sup> *Si aliter explicari nequit*] Talia non procedunt nisi ex magna et satis necessaria causa. Ulpianus l. *Si alius.* § 4 d. *quod vi aut clam*: ubi sequitur exemplum illud de ædibus intercis ar-

cendi incendii causa.

<sup>d</sup> *Omnem legem frangit*] *Quicquid coegit, defendit.* Lib. contr. xxvii. Ex-emplis idem Seneca illustrat in excerptis controversiæ IV. (Lib. IV.) *Necessitas est, que navigia jactu exonerat: necessitas est, que ruinis incendia opprimit: necessitas est lex temporis.* Theodorius Priscianus *Vetus Medicus*: *Es-*

2 Hence it follows, that in extreme necessity, the pristine right of using things revives, as if they had remained common: for in all laws, and thus in the law of ownership, extreme necessity is excepted.

3 Hence the rule, that in a voyage, if the provisions run short, what each one has must be thrown into the common stock. So to preserve my house from a conflagration which is raging, my neighbour's house may be pulled down: and ropes or nets may be cut, of which any ship has run foul, if it cannot be extricated otherwise. All which rules are not introduced by the Civil Law, but by the interpretations of it.

4 For among Theologians also, it is a received opinion, that in such a necessity, if any one take what is necessary to his life from any other's property, he does not commit theft: of which rule the reason is, that that which some allege, that the owner of the property is bound

sent quid de ea re sentirent, respondissent quod dicimus. *Necessitas*, inquit pater Seneca, *magnum humanæ imbecillitatis patrociniū*, <sup>Controv. iv. 27.</sup> *omnem legem* (humanam scilicet, aut ad humanæ modum factam) *frangit*. Cicero Philippica xi: *Cassius* <sup>Cap. 12.</sup> *in Syriam profectus est, alienam provinciam, si homines legibus scriptis uterentur: his vero oppressis, suam lege naturæ.* Apud Curtium est: *In communi calamitate suam* <sup>Lib. vi. 4.</sup> *quemque habere fortunam.*

VII. Sed cautiones adhibendæ sunt, ne evagetur hæc <sup>Less. xi. 12. Dub. 12. n. 70.</sup> licentia: quarum prima sit: omni modo primum tentandum, an alia ratione necessitas evadi possit, puta adeundo magistratum, aut etiam tentando, an rei usus a domino possit precibus obtineri. Plato ex vicini puteo aquam peti ita <sup>De Leg. viii. p. 844 n.</sup> demum permittit, si quis in suo ad cretam usque foderit ad aquam exquirendam: et Solon, si in suo foderit ad quadraginta cubitos: ubi addit Plutarchus: *ἀπορία γὰρ ᾤετο δεῖν βοηθεῖν, οὐκ ἀργίαν ἐφοδιάζειν* <sup>Viti. Sol. p. 81.</sup> *arbitrabatur subveniendum necessitati, non instruendam pigritiam.* Xenophon in response ad Sinopenses: *ὅποι δ' ἂν ἐλθόντες ἀγορὰν οὐκ ἔχωμεν, ἂν τε εἰς βάρβαρον γῆν, ἂν τε εἰς Ἑλληνίδα, οὐκ* <sup>Exped. Cyr. 7. 4.</sup>

*pedit pregnantibus in vita discrimine constitutis sub unius partus sæpe jactura salutem mercari certissimam, sicut arboribus crescentium ramorum accommodatur salutaris abscissio, et naves pressæ onere cum gravi tempestate jactantur, solum habent ex damno remedium.* Prima verba illa ad *ἐμβροθλοδοτην* pertinent, cujus instrumenti descriptio apud Gale-

num et Celsum, ac proinde eadem vox restituenda apud Tertullianum *de Anima* [Locus Tertulliani legitur cap. 25. Sed emendatio, quam Auctor heic proponit, ab aliis jam occupata fuerat, etiam ante H. STEPHANUM, qui illam probat, in Thesaurο suo, Tom. i. pag. 796. *J. B.*]

so much to him that needs it, out of charity: but this, that all things must be understood to be assigned to owners with some such benevolent exception of the Right thus primitively assigned. For if the first dividers had been asked what was their intention, they would have given such a one as we have stated. [Of necessity, see Seneca, Cicero, Curtius.]

VII. But cautions are to be applied, that this liberty go not too far.

First, that we must first endeavour in every way to avoid this necessity in some other manner, as by applying to the magistrate, or by trying whether we cannot obtain the use of things from the owner by entreaty. Plato allows a man to take water from his neighbour's well, if in his own he has dug down to the chalk, seeking water; and Solon, if he has dug in his own ground forty cubits. For as Plutarch says,

ὑβρει, ἀλλ' ἀνάγκη, λαμβάνομεν τὰ ἐπιτήδεια: ubi jus emendi nobis non conceditur, sive in Barbarico, sive in Græcánico solo, ibi quæ opus est sumimus, non per proterviam, sed ex necessitate.

VIII. Secundo, non concedendum hoc si pari necessitate ipse possessor teneatur: nam in pari causa possidentis melior est conditio. *Stultus non est*, ait Lactantius, *qui tabula naufragum, ne salutis quidem propriae causa, nec equo saucium dejecerit: quia se abstinuit a nocendo, quod est peccatum, et hoc peccatum vitare sit sapientia.* Cicero dixerat officiorum III. <sup>8</sup> *Nonne igitur sapiens, si fame ipse conficiatur, abstulerit cibum alteri, homini ad nullam rem utili? Minime vero. Non enim mihi est vita mea utilior quam animi talis affectio, neminem ut violem commodi mei gratia.* Apud Curtium legitur: *Melior est causa suum non tradentis, quam poscentis alienum.*

*Adv. quod*  
*i. art. 2. col. 3.*

*Covar. d.*  
*loc. n. 4.*

IX. Tertio ubi fieri poterit, faciendam restitutionem. Sunt quidam, qui aliter censent hoc argumento, quod qui jure suo usus est, ad restitutionem non obligetur. Sed verius est, jus hic non fuisse plenum, sed restrictum cum onere restituendi ubi necessitas cessaret. Tale enim jus sufficit ad servandam naturalem æquitatem contra rigorem dominii.

<sup>8</sup> Non agit Cicero de Casu, in quo et locus ille male aptatur, et sententia par est utriusque necessitas: adeoque ejus, in se spectata, rigida est ultra

he thought that necessity was to be relieved, not idleness encouraged; and Xenophon says to the Sinopians, If we are not allowed to buy, we must take; not from contempt of Rights, but from necessity.

VIII. Secondly, such liberty is not granted, if the possessor be in like necessity; for *cæteris paribus*, the case of the possessor is the better. Lactantius says, that he does not do amiss who abstains to thrust a drowning man from a plank, or a wounded man from his horse, even for the sake of his own preservation. So Cicero: and Curtius.

IX. Thirdly, that when it is possible, restitution be made. There are some who think otherwise on this point, and consider that, as the man used his own Right, he is not bound to restitution. But it is more true that this Right was not plenary, but limited by the burthen of restoring what was taken, when the necessity was over: for such a Right suffices to preserve the natural equity of the case against the rigour of ownership.

X. Hence we may collect how he who carries on a righteous

X. Hinc colligere est, quomodo ei, qui bellum pium gerit, liceat locum occupare, qui situs sit in solo pacato: nimirum si non imaginarium, sed certum sit periculum, ne hostis eum locum invadat, et inde irreparabilia damna det: deinde, si nihil sumatur, quod non ad cautionem sit necessarium, puta, nuda loci custodia, relicta domino vero jurisdictione et fructibus: postremo, si id fiat animo reddendæ custodiæ simulatque necessitas illa cessaverit. *Enna aut malo, aut necessario facinore retenta*, <sup>9</sup>ait Livius: quia malum hic, quicquid vel minimum abit a necessitate. Græci, qui cum Xenophonte erant, cum navibus omnino opus haberent, ipsius Xenophontis consilio ceperunt transeuntes, sed ita ut merces dominis intactas conservarent, nautis vero et alimenta darent, et pretium persolverent. Primum ergo quod post dominia ex veteri communione restat jus, est id quod jam diximus necessitatis.

XI. Alterum est utilitatis innoxia. *Quidni enim, inquit Cicero, quando sine detrimento suo potest, alteri communiceat in iis, quæ sunt accipienti utilia, danti non molesta?* Ideo Seneca beneficium negat dici posse ignis accendendi potestatem. Apud Plutarchum legimus Symposiaca VII. οὐτε γὰρ τροφήν ἀφανίζουσιν ὅσιον αὐτοὺς ἄδην ἔχοντας, οὐτε νάματος ἐμφορηθέντας, πηγὴν ἀποτυφλοῦν καὶ ἀποκρύπ-

modum. *J. B.*

patebit locum inspicienti. *J. B.*

<sup>9</sup> Non congruit hoc exemplum, ut

war may lawfully seize a place situate in a land which is not at war; namely, if there be a danger, not imaginary, but certain, that the enemy will seize that place, and thence do irreparable damage: and next, on condition that nothing be taken which is not necessary for this purpose of caution, for example, the mere custody of the place, leaving to the true owner the jurisdiction and the revenues: finally, if it be done with the intention of restoring the custody to the true owner as soon as the necessity is over: Livy says, *Enna retained by a step necessary, or unjustifiable*; because in such a case every thing is unjustifiable which is not necessary. So the Greeks who were with Xenophon, in their need took the ships which they found passing, spared the lading for its owners, fed and paid the sailors. This then is the first Right which, when ownership has been established, remains out of the old community of goods; namely, the Right of Necessity.

XI. Another Right is the Right of Harmless Use. *Why*, says Cicero, *when a man can without any loss to himself, should he not impart what is useful to the receiver, and not inconvenient to the giver?* So



τειν, οὔτε πλοῦ σημεῖα καὶ ὁδοῦ διαφθεῖρειν χρησαμένους, ἀλλ' ἔαν καὶ ἀπολείπειν τὰ χρήσιμα τοῖς δεησομένοις μεθ' ἡμᾶς. *Nam neque alimenta nobis fas est perdere, ubi ipsi plus satis habemus, neque fontem, postquam inde quantum libet potaverimus, obturare aut occultare, neque signa navigationis aut itineris abolere, quæ nobis usui fuerint.* [*Sed relinquenda ista sunt, ut aliis etiam post nos usui esse possint.*]

XII. Sic flumen, qua flumen dicitur, proprium est populi, cujus intra fines fluit, vel ejus, cujus in ditione est populus: atque ei licet molem in flumen injicere: et quæ in flumine nascuntur, ejus sunt. At idem flumen, qua aqua profluens vocatur, commune mansit, nimirum ut bibi hauriri que possit.

I. Quædam 2.  
D. de Rer.  
Div. § 1.

Quis vetet apposito lumen de lumine sumi;  
Atque cavum vastas in mare servet aquas?

Art. Am. iii.  
92.  
Metam. vi.  
349.

Inquit Ovidius: apud quem et Lycios Latona sic alloquitur:

Quid prohibetis aquas? usus communis aquarum est:

Ubi et undas vocat munera publica, id est, hominibus communia, vocis publicæ acceptione minus propria: quo sensu res quædam publicæ juris gentium dicuntur. Virgilius undam eodem sensu dixit cunctis patentem.

Æn. vii. 230.

\* *Usus qui prodest his, illiison nocet*] Servius ad VII. *Æneidos*: *littusque rogamus innocuum: cujus vindicatio, ait, nulli possit nocere.* (Vers. 230).

† *Justum eo nomine bellum*] *Justa bella gerebantur a filiis Israel contra Amorraeos*, ait indicato hic loco Augustinus. Sic Amyntorem Orchomeni re-

Seneca denies that we have a Right to refuse a man permission to light his fire at ours. So in Plutarch, we are not to destroy meat when we have more than we need, nor to conceal or to muddy a spring of water, when we have used it, nor to pull down guide-posts or sea-marks which have done their service to us: they are to be left to be of use to others.

XII. So a river, as it is a river, is the property of the people within whose boundary it flows, or of him under whose authority the people is. He may run a pier into the river; and what is produced in the river is his. But the same river, as it is flowing water, remains common, for drawing or drinking: so Ovid. Water is in this way public property. So Virgil.

XIII. 1 And so land, and rivers, and any part of the sea which is become the property of any people, ought not to be shut against those who have need of transit for just cause; say, because being expelled from their own country they seek a place to settle; or because

XIII. 1 Sic et terræ, et flumina, et siqua pars maris in proprietatem populi alicujus venit, patere debet his qui transitu opus habent ad causas justas; puta, quia suis finibus expulsi quærent terras vacuas, aut quia commercium expetunt cum gente seposita, aut etiam quia quod suum est justo bello petunt. Ratio hic eadem quæ supra, quia dominium introduci potuit cum receptione talis usus, qui prodest his, illis non nocet: ideoque dominii auctores id potius censendi sunt voluisse.

Bal. 117.  
cons. 193.

2 Exemplum habemus insigne in Mosis historia, qui cum transeundum haberet per alienos fines, primum Idumæo, deinde Emoræo has tulit leges, iturum se via regia, nec deflexurum ad possessiones privatas. Si qua re ipsorum haberet opus, justum pretium eis persoliturum. Quæ conditiones cum repudiarentur, justum eo nomine bellum intulit Emoræo. *Innoxius enim transitus denegabatur*, inquit Augustinus, *qui jure humanæ societatis æquissimo patere debebat.*

Num. xx. et  
xxi.

Lib. qu. 44.  
super Num.  
ad cap. 20.

3 Græci, qui cum Clearcho: *πορευοίμεθα δὲ ἀν οἴκαδε, εἴ τις ἡμᾶς μὴ λυποῖη ἀδικοῦντα μὲν τοι πειρασόμεθα σὺν τοῖς θεοῖς ἀμύνασθαι. Domum ibimus, si nemo molestus sit: si quis injuriam faciat, eum Deorum ope arcere cona-*

Apud Xenop.  
De Exp. Cyr.  
ii. 3. § 12.

gem ob negatum transitum interfecit Hercules, notante id Apollodoro (*Bibl. Lib. 11. c. 7, § 7*). Græci Telephum bello petiere, quod eos per fines suos

transire passus non esset: notat Scholiastes ad Horatii carmen (*Epod. xvii. 8*) in Canadum. Adde *legem Longobardicam*, Lib. 11. Tit. liii. cap. 2.

they seek traffic with a remote nation; or because they seek their own in a just war. The reason is the same as above; that ownership might be introduced with the reservation of such a use, which is of great advantage to the one party and of no disadvantage to the other; and the authors of ownership are to be supposed to have intended this\*.

2 We have a valuable example of this in the history of Moses, who applied first to the Edomites, and then to the Amorites (Numb. xx. and xxi.), for leave to pass through the land on condition of going by the king's high way, and paying for what they took. And when these conditions were rejected, he on that account made war on the Amorites; justly, as Augustine says.

3 The Greeks, of the ten thousand under Clearchus, claimed the same Right; so Agesilaus, Lysander, the Batavi, Cimon. The middle

\* Gronovius in a long note gives very strong reasons why this Right of Transit cannot be held, and cases in which it has been negatived.

Plut. Apop.  
p. 211 c.

Ibid. p. 229 c.

Hist. iv. 20.

Plut. Cimo.  
p. 480 c.

*bimur*. Nec multo aliter <sup>s</sup> Agesilaus, cum ex Asia rediens ad Troadem venisset, interrogavit, ut amicum se an ut hostem transire vellent: Et <sup>h</sup> Lysander Bœotios, rectis se hastis transire vellent, an inclinatis. Batavi apud Tacitum Bonnensibus nuntiant: *Si nemo obsisteret, innoxium iter fore: sin arma occurrant, ferro viam inventuros*. Cimon quondam Lacedæmoniûs suppetias laturus per agrum Corinthium traduxerat copias. Reprehensus a Corinthiis quod non prius civitatem compellasset: nam et qui fores alienas pulset, non intrare nisi domini permisso: *At vos, inquit, Cleonæorum et Megarensium fores non pulsastis, sed perfregistis, censentes omnia patere debere plus valentibus*. Media sententia vera est, <sup>i</sup> postulandum prius transitum; sed si negetur, vindicari posse. <sup>k</sup> Ita Agesilaus ex Asia rediens cum a rege Macedonum transitum postulasset, atque is consultaturum se dixisset: *Consultet, inquit, nos interea transibimus*.

4 Neque recte excipiet aliquis metuere se multitudinem transeuntium. Jus enim meum metu tuo non tollitur: eoque minus, quia sunt rationes cavendi, ut si divisis manibus trans-

<sup>s</sup> *Agesilaus*] Vide etiam in ejus vita hac de re Plutarchum. (Pag. 604).

<sup>h</sup> *Lysander*] Et in hujus vita eundem. (Pag. 445 D.)

<sup>i</sup> *Postulandum prius transitum*] Aristophanes *Avidus* (vers. 188):

Εἰς ὡσπερ ἡμεῖς ἦν ἰέναι βουλώμεθα  
Πυθίδε Βουωτοῦς δίοδον αἰτούμεθα.

Ut nos, cum nobis Delphos sumendum est iter,

Prius Bœotos transitum deposcimus.

Ubi Scholiastes: *τότε μόνον δίοδον ζητοῦσιν, ὅταν στρατεύμα διάγη, tunc demum iter poscitur, ubi exercitus traducitur*. Veneti et Germanis, et Gallis

de Marano certantibus iter præbuere. Paruta XI. Iidem Germanis conquestibus de transitu hostibus dato, ostendunt id nisi armis impediri non potuisse, quibus uti non mos sibi, nisi in hostes manifestos: eodem libro. Sic et Pontifex se excusat, libro ejusdem XII.

<sup>k</sup> *Ita Agesilaus ex Asia rediens a rege Macedonum*] Etiam hac de re Plutarchum in ejus vita inspice. (Pag. 604.)

<sup>i</sup> *Si inermes*] Exemplum in excerpto legationum XII. et apud Bembum L. VII. *Historia Italica*. [Immo *Venetæ*, fol. 104. *Ed. Ven. 1551.*] Vide et notabilia pacta de transitu inter Fredericum

opinion is the true one; that a transit is first to be requested; but if denied, may be asserted by force. So Agesilaus, when the king of Macedon, thus applied to, said he would consult, replied, *Let him consult, meantime we shall pass through*.

4 Nor can any one properly object that he is afraid of the multitude of those who make the transit. For my Right is not taken away by your fear; and this the loss, because there are ways of providing against danger; as by sending the body of persons in small parties, and without arms, as the Cologneso proposed to the Germans; by placing guards at the expense of the transit-seekers; by taking

mittantur copiae, <sup>1</sup>si inermes, quod Agrippinenses Germanis dicebant: quem morem antiquitus in Eleorum regione observatum notavit Strabo: si impensa transeuntis, is qui transitum concedit, sibi praesidia idonea conducatur: <sup>2</sup>si obsides dentur, quod a Demetrio Seleucus postulabat, ut eum intra sui imperii fines subsistere sineret. Sic etiam metus ab eo in quem bellum justum movet is qui transit, ad negandum transitum non valet. Neque magis admittendum si dicas, et alia posse transiri: tantundem enim quis diceret, atque eo modo jus transiendi plane interimeretur: sed satis est si sine dolo malo transitus postuletur, qua proximum ac commodissimum est. Plane si injustum moveat bellum, qui transire vult, <sup>3</sup>si hostes meos secum ducat, negare transitum potero: nam et in suo ipsius solo ei occurrere atque iter impedire fas esset.

5 Neque vero personis tantum, sed et mercibus transitus debetur. <sup>1</sup>Nam quominus gens quæque cum quavis gente seposita commercium colat, impediendi nemini jus est: id enim permitti interest societatis humanæ; nec cuiquam damno id est: nam etiam si cui lucrum speratum, sed non debitum, de-

Barbaroesum et Isacium Angelum apud Nicetam libro II. (cap. 4 et 7) de vita ejusdem Isacii aliquot locis: in imperio Germanico transitum postulans de damno resarciendo cavet: vide et Crantsium *Saxoniarum* x. et Mendosam *In Belgica*. Caesar Helvetiis iter per provinciam noluit concedere, quod homines inimico animo existimabat non temperatos ab injuriis et maleficio: *De Bello Gallico*, Lib. I. [cap. 7, 8. Ex quo Auctore sit *Excerptum Legat.* initio istius notæ indicatum, omisit Auctor, aut Typographus, in omnibus Edit. nec in ulla Collectione ejusmodi *Ex-*

*ceptorum invenire potui.]*

<sup>2</sup> *Si obsides dentur*] Exemplum habes Procopii *Persicorum* II.

<sup>3</sup> *Si hostes meos secum ducat*] Hoc dicebant Franci, qui in Venetia erant, Narseti Longobardos secum ducenti, *Gotthicorum* IV. (seu *Hist. Misc.* c. 26). Alia negati itineris exempla habes apud Bembum libro VII. *Italicorum* [*Hist. Venet.* eodem loco, qui in Nota antepenultima indicatus est:] apud Parutam libro *Historiae Venetae*, v. et VI.

<sup>1</sup> Vide PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. III. cap. 3, § 6, cum Notis nostris. *J. B.*

hostages. So too fear of war from him against whom the transit-seeker makes a righteous war, does not justify him in refusing. Nor is it enough to say that he may pass another way: for every one might say the same, and thus the Right of Transit be destroyed. It is enough if he pass *bond fide* by the shortest and most convenient way. If indeed he who seeks transit makes an unjust war, or brings my enemies with him, I may deny the transit; for in such a case I might meet him on his own ground and stop his way.

5 Transit is to be granted not only to persons, but to merchandise; for no one has a right to impede one nation in cultivating trade

cedat, id damni vice reputari non debet. Testimoniis, quæ ad hanc rem produximus alibi, addemus unum ex Philone: *πᾶσα δὲ θάλαττα φορτηγοῖς ὀλκάσιν ἀκινδύνως διαπλεῖται, κατὰ τὰς ἀντιδόσεις ὧν ἀλλήλαις ἀγαθῶν ἀντεκτινύουσιν αἱ χῶραι κοινωνίας ἡμέρω, τὰ μὲν ἐνδέοντα λαμβάνουσαι, ὧν δὲ ἄγουσι περιουσίαν ἀντιπέμπουσαι. φθόνος γὰρ οὐδέποτε πᾶσαν τὴν οἰκουμένην ἐκράτησεν, ἀλλ' οὐδὲ τὰς μεγάλας αὐτῆς ἀποτομᾶς. Mare omne navibus onerariis tuto satis navigatur, pro commercio quod ex naturalis societatis desiderio inter nationes intercedit, dum mutuo aliarum copia aliarum inopia succurrit. Nam invidia nunquam aut orbem universum, aut magnas ejus partes invasit.* Alterum ex Plutarcho, qui de mari sic loquitur: *ἄγριον ὄντα καὶ ἀσύμβολον τὸν βίον τοῦτο τὸ στοιχεῖον συνῆψε καὶ τέλειον ἐποίησε, διορθούμενον ταῖς παρ' ἀλλήλων ἐπικουρίαις, καὶ ἀντιδόσεσι κοινωνίαν ἐργαζόμενον καὶ φιλίαν. Vitam nostram feram alioqui et commerciorum exsortem, hoc elementum sociavit atque perfecit, supplens quod deerat ope mutua, et permutatione rerum societatem amicitiamque concilians.* Quicum convenit Libanii illud: *οὐ μὲν τοι πάντα γε πᾶσιν ἐνειμε μέρεςιν, ἀλλὰ διήρει τὰ δῶρα κατὰ τοὺς χεῖρους, εἰς κοινωνίαν τοὺς ἀνθρώ-*

*Aqu. et Igm.  
Comp. p. 957.*

o *Ex Philone*] In legatione ad Caium. (Pag. 998, 999.)

p *Eo commercio quod ex naturalis societatis desiderio inter nationes intercedit*] Servius ad *Eclogam* iv. (vers. 37) *navigatio ex mercimonii ratione descendit.* Idem ad *Georgicon* i. (vers. 137) *significat, necessitate quaerendarum rerum homines navigandi peritiam ac studium reperisse, commune bonum erat patere commercium maris.* [Ultima verba, *Commune bonum, &c.*, non sunt Servii, sed Senecæ, *De Benef.* i. 8. *J. B.*] Ambrosius in opere *De Creatione* (seu *Hexaëmer.* Lib. III. cap. 5): *Bonum mare tanquam hospitium fluviorum,*

*fons imbrum, derivatio alluvionum, in- vectio comœatum, quo sibi distantes populi copulantur:* quæ ex Basilio sumpta *Hexaëmeri* iv. (Pag. 45, 46, Tom. i. *Ed. Paris.* 1638.) *Mare forum mundi, insulas stationes in mari, eleganter dixit de providentia* II. Theodoretus. Adjungam his Chrysostomi ad *Stelechium* verba: *τί ἂν τις εἴποι τὴν πρὸς τὰς ἐπιμιξίας εὐκολίαν γενομένην ἡμῖν; ἵνα γὰρ μὴ τῆς ὀδοιπορίας τὸ μήκος ἀποτροπή γίγνοιτο τῆς συνοσίας τῆς πρὸς ἀλλήλους, ἐπιτομωτέραν ὁδὸν τὴν θάλατταν ἀνῆκε πανταχοῦ τῆς γῆς ὁ Θεός· ἵνα ὡσπερ οἶκον ἕνα, τὴν οἰκουμένην οἰκοῦντες, οὕτω θαμνιά πρὸς*

with another remote nation; for it is of advantage to the human race that such intercourse should be permitted: nor is that a damage to any one; for if any one misses some gain which he had reckoned upon but never had, that is not to be reckoned loss\*. So Philo, Plu-

\* Gronovius notes that this is much too lax and liberal, and contrary to the practice of nations, as he shews by examples.

πους ἄγων τῆ παρ' ἀλλήλων χρεία. καὶ φαίνει δὴ τὰς ἐμπορίας, ὅπως τῶν παρ' ἐνίοις φυομένων κοινῆν εἰς ἅπαντας ἐνέργη τὴν ἀπόλαυσιν· *Deus non omnia omnibus terræ partibus concessit, sed per regiones dona sua distribuit, quo homines alii aliorum indigentes ope societatem colerent. Itaque mercaturam excitavit, ut quæ usquam nata sunt, iis communiter frui omnes possent.* Euripides quoque Supplicibus Thesea inducens loquentem, his quæ humana ratio in commune bonum reperit, navigationem annumerat, his verbis (vers. 210):

Πόντου τε ναυστολήμαθ', εἰς διαλλαγὰς  
Ἔχοιμεν ἀλλήλοισιν ὧν πίνοντο γῆ.

Et cuique terræ, quæ suum ingenium negat,  
Supplere ratium pelagiis discursibus.

Apud Florum est: *Sublatis commerciis, rupto fœdere generis Lib. III. c. humani.*

XIV. 1 Sed quæritur, an ita transeuntibus mercibus terra, aut amne, aut parte maris, quæ terræ accessio dici possit, vectigalia imponi possint ab eo, qui in terra imperium habet. <sup>2</sup>Certe quæcunque onera ad illas merces nullum habent respectum, ea mercibus istis imponi nulla æquitas patitur.

ἀλλήλους βαδίζωμεν, καὶ τῶν παρ' αὐτῶ ἕκαστος τῶ πλησίον μεταδίδουε εὐκόλως ἀντιλαμβάνη τὰ παρ' ἐκείνου, καὶ μικρὸν τῆε γῆε μέρος κατέχων ὡσπερ ἀπάσης κύριος ὧν, τῶν πανταχοῦ γινομένων ἀπολαύη καλῶν. καὶ νῦν ἔξεστι καθάπερ ἐπὶ τραπέζης πλουσίας, ἕκαστον τῶν δαιτυμόνων τὸ παρατεθειμένον αὐτῶ δόντα τῶ πόρρωθεν κατακειμένῳ, τὸ παρακείμενον ἀντιλαβεῖν, τὴν χεῖρα μόνον ἐκτείναντα· Quo modo autem satis ἄγνε quis explicet facilitatem ad mutua commercia nobis datam? Ne enim itineris longitudo impedimentum aliorum ad alios commeatibus adferret, breviorē viam, mare

scilicet, ubique terrarum disposuit Deus, ut mundum tanquam unam domum communiter inhabitantes, crebro nos invicem viseremus, et apud se nata quisque alteri communicans vicissim commode acciperet res apud illum abundantes, ac sio exiguum tenens terræ partem, ita tanquam si teneret universam, frueretur ejus, quæ ubivis sunt, bonis. Licet itaque nunc tanquam in communi mensa convivarum unicuique ea quæ sibi apposita dare alteri longius accumbenti, ac contra quæ apud ipsum sunt, accipere manu tantum extenta. (Tom. VI. Pag. 157.)

<sup>2</sup> Propter transitum solum potest

tarch, Libanius, Euripides, Florus.

XIV. 1 It is made a question whether, when merchandize thus passes through a country, the Rulers of that country may impose a transit-duty. And certainly whatever taxes have no respect to the articles of merchandize, cannot equitably be imposed on them. So

Sic nec capitatio, civibus imposita ad sustentanda reipublicæ onera, ab exteris transeuntibus exigi potest.

2 Sed si aut ad præstandam securitatem mercibus, aut inter cetera etiam ob hoc onera sustinentur, ad ea compensanda vectigal aliquod imponi mercibus potest, dum modus causæ non excedatur. <sup>9</sup>Inde enim pendet justitia, ut tributum ita et vectigalis. Sic vectigal equorum et neti, quæ Isthmum Syriacum transibant, accepit rex Solomo. De thure Plinius: *Evehi non potest, nisi per Gebanitas.* <sup>1</sup>Itaque et horum regi penditur vectigal. Sic ditati Massilienses ex fossa quam ex Rhodano in mare Marius duxerat, *πραπτόμενοι τοὺς ἀναπλέοντας καὶ τοὺς καταγομένους*: <sup>2</sup>“*vectigal exigentes ab iis, qui navibus ascenderent aut descenderent*, ut Strabo narrat libro quarto. Idem libro octavo nos docet, Corinthios ab antiquissimis usque temporibus vectigal percepisse de mercibus, quæ ad vitandum Maleæ flexum, terra de mari in mare transferebantur. Sic pro Rheni transitu pretium accipiebant Romani. *Etiam in pontibus pro transitu datur*, inquit Seneca. Et de fluminum transitu pleni sunt jurisconsultorum libri.

3 Sed frequens est ut æquus modus non servetur, cujus rei Phylarchos Arabum incusat Strabo, hoc addito: *χαλεπὸν*

omnino aliquid exigi, eodem jure, quo rei suæ usu quisvis alios arcet. Dicemus in Notis Gallicis. Interim vide quæ scripsimus in PUFENDORF. *De Jure Nat. et Gent.* Lib. III. cap. 3, § 7, ultimæ Editionis. *J. B.*

<sup>9</sup> *Inde enim pendet justitia, ut tributa ita et vectigalis* [Vide *Legem Longobardicam*, Libro III. Titulo 1. cap. 31, 33. et epistolam Episcoporum ad Ludovi-

cum regem, quæ inter capitula legitur Caroli Calvi, cap. 14.

<sup>1</sup> *Itaque et horum regi penditur vectigal* [Simile apud Leonem Afrum non longe ab initio. [Forte Pag. 47, *Ed. Elzevir.* 1632.]

<sup>2</sup> *Vectigal exigentes ab iis, qui navibus ascenderent aut descenderent* [Huc alludens Aristophanes in *Avibus* vult interstrui aerem, ut Dii cogantur de

neither a capitation tax, nor taxes for the general purposes of the State, can be required of foreigners passing through.

2 But if, either to provide security for the merchandize, or for this along with other objects, a burthen fall on the country, a tax may be imposed on the merchandize, if it do not go beyond the measure of the cause. That is the measure of the equity, as of other taxes, so of duties on merchandize. Thus Solomon (1 Kings x. 28) had a tax upon horses and linen yarn which passed the isthmus of Suez. So transit duty was demanded by the Gebanites, Massilians, Corinthians, Romans. And the jurists have much to say of the passage of rivers.

3 But this limit is often transgressed; as by the Arabian chiefs.

1 Reg. x. 28.

Hist. Nat. xii. 14.

p. 183.

p. 378.

Tacit. Hist. iv. 68. n. 6.  
De Const. Sapiens. 14.  
Chop. de Do. i. Tit. 9.  
Ferry. l. 1.  
De Jure Fisci. l. n. 92.  
Aug. Cons. 199.  
Zabar. Cons. 38. Firm. Inbr. de Gabell. Lib. xvi. p. 748.

γὰρ ἐν τοῖς τοσούτοις καὶ τοῖς ἀνθάδεσι κοινὸν ἀφορισθῆναι μέτρον τὸ τῶ ἐμπόρῳ λυσιτελές. *Difficile enim est, ut inter validos et feroces definiatur modus mercatori non gravis.*

XV. 1 Morari quoque aliquantisper prætervehentibus aut prætereuntibus, valetudinis, aut alia qua justa de causa, licere debet: nam est et hoc inter utilitates innoxias. <sup>1</sup>Itaque Ilioneus apud Virgilium, cum Trojani in terra Africa consistere vetarentur, Deos judices audent invocare: et probata Græcis querela Megarensium adversus Athenienses, qui eos portubus suis arcebant, *παρὰ τὰ κοινὰ δίκαια, contra jus commune*, ut Plutarchus loquitur: ita ut Lacedæmoniis nulla belli causa justior visa fuerit <sup>3</sup>.

*Vict. de Indis. Ralect.*  
2. n. 1.  
*Æn.* l. 543,  
et seqq.

2 Cui et hoc consequens est, ut tugurium momentaneum ponere liceat, puta in littore, etiamsi littus a populo occupatum concedamus: nam quod decretum prætoris adhibendum dixit Pomponius, ut in littore publico vel mari exstruere quid liceat, ad permanentia ædificia pertinet: quo et illud poëtæ:

*Pericle, p.*  
168 a.  
*Diod. xli. p.*  
306. *Thuc.*  
l. 67.

Contracta pisces æquora sentiant  
Jactis in altum molibus.

*Horat. l. Od.*  
l. 33.

XVI. Sed et perpetua habitatio his, qui sedibus suis expulsi receptum quæerunt, <sup>4</sup>deneganda non est externis, dum et

victimarum nidore vectigal pendere.  
(Vers. 190, et seqq.)

<sup>1</sup> *Itaque Ilioneus*] Servius ad eum locum: *Occupantis enim est possessio littoris: unde ostenduntur crudeles, qui etiam a communibus prohibeant*, Laomedon ab Hercule occisus quod eum Trojæ portu pelleret, Servio ibidem narrante. [Non, sed ad vers. 619.]

<sup>3</sup> Hoc erat contra fœdera. Deinde

libertatem commerciorum, non vero facultatem tantum aliquantisper morandi, de qua agitur heic, *Megarensibus Athenienses*, denegabant. Inspice Auctorum loca in margine a me distinctius designata. *J. B.*

<sup>4</sup> Vide PUFENDORF. *De Jure Nat. et Gent.* Lib. III. cap. 3. § 10, et seqq. ubi hæc quæstio, et sequentes accuratius expenduntur. *J. B.*

XV. 1 It ought also be permitted to those that travel through the land, to tarry there for a short time for the sake of health or other just cause; for this also is a harmless use. So Ilioneus in Virgil; and when the Megareans complained that the Athenians excluded them from their ports *contrary to the known rules of justice*, their complaint was approved by the Greeks.

2 It is consequent upon this, that the transit-maker may erect a momentary hut, on the shore for instance, though the shore be occupied already. For the rule that it requires the order of a judge to build on the shore or in the sea, refers to permanent structures.

XVI. Further, a place of settlement is not to be denied to



imperium, quod constitutum est, subeant, et quæ alia ad vitandas seditiones sunt necessaria: quam æquitatem recte observavit divinus poëta, cum Æneam inducit has ferentem conditiones (*Æn.* XII. 192):

Socer arma Latinus habeto,  
Imperium solenne socer.

*Ant. Rom.*  
I. 58.

Et apud Halicarnassensem Latinus ipse æquam esse dicit Æneæ causam, si sedium inopia compulsus eo advenisset.

*Lib. xvii. p.*  
802.  
*De Offic. III. 7.*

Barbarorum est hospites pellere, ait ex Eratosthene Strabo: nec probati hac in parte Spartani. Ambrosio quoque iudice illi, qui peregrinos urbe prohibent, nequaquam probandi. Sic

*Herod. I. 180.*  
*Paus. vii.*  
*Diod. v. 288.*  
*Herod. iv. 45.*  
*Oros. vii.*

Æoles Colophonios, Rhodii Phorbantem ejusque socios, Cares Melios, Lacedæmonii Minyas, Cumæi alios ad se adventantes exceperunt. At de iisdem Minyis recte Herodotus, cum recepti partem imperii poscerent, ait eos *ἐξυβρίσαι καὶ ποιῆσαι οὐχ ὄσια*, injuriosos fuisse et fecisse quæ facere fas non erat: beneficium ab illis in injuriam versum dixit Valerius

*Lib. iv. 146.*

Maximus.

*Lib. iv. 6.*  
*ext. 3.*

XVII. Sed et si quid intra territorium populi est deserti ac sterilis soli, id quoque advenis postulantibus concedendum est, aut etiam ab illis recte occupatur, quia occupatum censeri non debet, quod non excolitur, nisi imperium quod attinet, quod populo veteri salvum manet. Trojanis data a Latinis Aboriginibus jugera duri atque asperrimi agri septingenta,

¶ *Ut Servius notat*] Ex Catone, Senna, aliisque veterum.

\* *Separare a commerciis communis parentis*] Plutarchus *Pericle de Mega-*

foreigners who are expelled from their own country; provided that they submit to the constituted government, and such other regulations as are requisite to avoid confusion. So Virgil, Dionysius of Halicarnassus, Eratosthenes, the Eolians, Rhodians, Carians, Lacedæmonians, Cumæans. But when the Minyans coming thus, asked the Lacedæmonians to share their power with them, they were injurious aggressors, as Herodotus speaks; and Valerius says that they turned a benefit into an injury.

XVII. And if there be any portion of the soil of a territory desert and barren, that also is to be given up to immigrants who ask for it; or even may be rightly occupied by them; because that which is not cultivated, is not to be conceived as occupied, except as to the ownership, which continues to be in the old people. So the Latin Aborigines granted land to the Romans; so Dio Prussensis says; so the Ansibarii in Tacitus held: though their general doctrine was wrongly

ut Servius notat. Apud Dionem Prusæensem oratione VII. Ad Lib. xl. Æn. v. 316. p. 106 c.  
 legimus: οὐδὲν ἀδικοῦσιν οἱ τὴν ἀργὴν τῆς χώρας ἐργαζόμενοι: nihil peccant qui partem terræ incultam colunt.  
 Clamabant olim Ansibarii: sicut cælum Diis, ~~ita terras generi~~ Tact. Ann. xiii. 55.  
 mortalium datas, quæque sint vacuæ, eas publicas esse: Solem, quin etiam et sidera respicientes quasi coram interrogabant, vellentne contueri inane solum: potius mare superfunderent adversus terrarum ereptores. Sed male dicta hæc generalia rei præsentī aptabant: nam terræ illæ non omnino erant vacuæ, sed pascendis pecoribus et armentis militum serviebant: quæ justa Romanis negandi causa. Nec minus juste jam olim Romani ex Gallis Senonibus quærebant: quod jus Liv. v. 36.  
 esset agrum a possessoribus petere, aut minari arma?

XVIII. Post jus commune ad res sequitur jus commune ad actus: quod datur aut simpliciter, aut ex suppositione. Simpliciter datur hoc jus ad actus tales, quibus ea comparantur, sine quibus vita commode duci nequit. Non enim par hic necessitas requiritur ut in re aliena arripienda: quia hic non agitur de eo, quod fiat domino invito, sed de modo acquirendi dominis volentibus: tantum ne id aut lege lata, aut conspiratione impedire liceat. Est enim tale impedimentum naturæ societatis contrarium in his, quas dixi, rebus. Hoc est, quod Ambrosius vocat, <sup>x</sup>separare a commerciis communis parentis, fusos omnibus partus negare, consortia vi- De Offic. III. 7.

rensibus (pag. 168 B): αἰτιώμενοι πάσης μὲν ἀγορᾶς, πάντων δὲ λιμένων,

ὡν Ἀθηναῖοι κρατοῦσιν εἰργεσθαι, καὶ ἀπελαύνεσθαι παρὰ τὰ κοινὰ δίκαια.

applied in that case; for the lands were occupied: so the Romans rightly resisted the Senones on the same ground.

XVIII. After the Common Right to things follows the Common Right to acts; and this is given either simply or hypothetically. There is given simply a Right to those acts without which life cannot conveniently be sustained, and others which may be compared with these. The same necessity is not required here, as in taking what belongs to another; for here we do not speak of what may be done, the owner being unwilling; but of the mode of acquiring things with the owner's consent; asserting only, that he may not prevent the acquisition either by law or by conspiracy. For such impediment in such matters is contrary to the nature of human society. This is, as Ambrose says, to separate ourselves from the intercourse of our common parent; to deny what is given for all; to tear up the root of our common life. For we do not now speak of superfluities, the

*vendi averruncare.* Nam de supervacuis et mere voluptariis non agimus, sed de his quæ vita desiderat, puta alimentis, vestimentis, medicamentis.

XIX. Ad hæc igitur æquo pretio comparanda jus esse omnibus hominibus asseveramus: demto, si a quibus petitur ipsi ejus rei indigeant: <sup>γ</sup>quomodo in summa penuria frumenti venditio prohibetur. Et tamen ne in tali quidem necessitate expelli posse admissos semel peregrinos, sed commune malum communiter tolerandum ostendit indicato jam loco Ambrosius.

Covar. *Var. Res.* iii. 14. *Ibid. Tert.* p. 270.

Molina *Disp.* 105. *Epi. Reg. de Act. Supernat. Disp.* 31. *Dub.* 2. n. 22. *Cens. Bell. Gall.* xi. 15. *Lib.* xvi. p. 784.

XX. Ad sua autem vendenda non sequum jus est: nam cuilibet liberum est statuere, quid velit acquirere aut non. Ita vinum et alias merces exoticas olim non recipiebant Belgæ. Et de Arabibus Nabatæis Strabo, *εἰσαγώγιμα δ' ἐστὶ τὰ μὲν τελέως, τὰ δ' οὐ παντελῶς*: <sup>2</sup>*importare merces quasdam licet, quasdam non item.*

XXI. 1 In hoc jure, quo diximus, inesse censemus etiam libertatem matrimonia ambiendi et contrahendi apud vicinas gentes: puta, si virorum populus aliunde expulsus alio advenit: <sup>5</sup>*nam sine femina ætatem agere etsi humanæ naturæ*

*Dequerabantur omni se mercatu, omni portu, quem tenerent Athenienses, arceri depellique contra gentium jura.* Seneca *epistola LXXXVII.* recitato Virgillii loco (*Georg.* 1. 53):

Et quid quæque ferat regio et quid quæque recuset.

*Ista in regione descripta sunt, ut necessarium mortalibus esset inter ipsos commercium, si invicem alius ab alio aliquid peteret.* Idem *Naturalium* v. 18. *Quid quod omnibus inter se populis commercium dedit, et gentes dissipatas locis, miscuit?* Vide Anglorum querelas de

mere instruments of pleasure; but of the necessaries of life, food, clothing, medicaments.

XIX. We say then that these things, all men have a Right to purchase at a fair price; excepting when they from whom they are asked, themselves need them: as in a great scarcity of corn, it is forbidden to be sold. And yet even in such a necessity, foreigners once admitted cannot be expelled, but the common evil is to be borne in common, as Ambrose says.

XX. We have not the same Right to sell what we have; for every one is free to decide what he will acquire, and what not. Thus formerly the Belgians would not admit wine and other foreign merchandize: and the Arabians admitted some articles and not others.

XXI. 1 In the Right of which we speak is included, we conceive, the Right of seeking and making marriages with neighbouring nations: if for instance, a population entirely male expelled from some other place come thither. For to live without marriage, though

non omnino repugnat, repugnat tamen naturæ plerorumque hominum. Cœlibatus enim non nisi excellentibus animis convenit. Quare facultas comparandi uxores adimi viris non debet. Romulus apud Livium vicinos rogat, ne graventur homines cum hominibus sanguinem et genus miscere. Canuleius apud eundem: *Connubium petimus, quod finitimis externisque dari solet. Jure belli injuste negatas nuptias juste victor auferret*, Augustino iudice.

Lib. i. 9.

Lib. iv. 3.

De Civ. Dei,  
ii. 17.

2 Leges autem civiles aliquorum populorum, quæ connubia exteris negant, aut ea ratione nituntur, quod temporibus, quibus sunt conditæ, nulli erant populi, quibus non feminarum copia suppeteret, aut non de quibusvis connubiis agunt, sed de iis, quæ justa sunt, hoc est, quæ speciales quosdam juris civilis effectus producant.

XXII. Ex suppositione jus commune est ad actus, quos populus aliquis externis promiscue permittet. Nam tunc si unus populus excludatur, ei fit injuria. Sic, si externis alicubi venari, piscari, aucupari, margaritas legere licet, si ex testamento capere, si res vendere, si etiam extra penuriam feminarum conjugia contrahere, uni populo id negari non

Viel. d. Rel.  
2. n. 2. 3.

Hispanis apud Thuanum libro LXXI. in historia anni MD LXXX.

1 *Quomodo in summa penuria frumenti venditio prohibetur*] Cassiodorus i. epistola XXXIV. *Copia frumentorum debet provinciæ primum prodesse, cui nascitur.*

2 *Importare merces quasdam licet, quasdam non item*] Vide Crantallum *Saxoniorum* xi. (Cap. 3.)

3 At vero necesse non est, ut Populus, sive virorum, sive utriusque sexus, numquam intereat. Plura diximus in notis Gallicis. J. B.

not entirely repugnant to human nature, is repugnant to the nature of most men. Celibacy suits only superior minds: therefore men ought not to be deprived of the means of getting wives. So Romulus in Livy: so Canuleius. So Augustine.

2 The Laws of some nations, which deny marriage to strangers, either depend on this ground, that at the time when they were made there was no people which had not a sufficient supply of women; or they do not treat of marriage in general, but of that marriage which is legitimate in a peculiar sense, that is, which produces some special kind of legal effects.

XXII. The Right *hypothetical* to acts, refers to acts which any nation has permitted to strangers generally: in this case, if one people be excluded from such acts, it is wronged. Thus if it be permitted to strangers to catch beasts, fish, birds, in certain places, or to get pearls; to take legacies, to sell goods, to contract marriages, even without the plea of want of women, that cannot be denied to one particular people,

*Jud. xx.* potest; nisi delictum præcesserit: qua de caussa Benjaminitis Hebræi ceteri ademerunt connubii facultatem.

*Disp. 105.* XXIII. Sed de permissis quod diximus, intelligendum est de his, quæ permissa sunt tanquam ex vi naturalis libertatis nulla lege sublata: non si permissa sint per beneficium, relaxando legem: nam in beneficii negatione nulla est injuria. Atque ita arbitramur conciliari posse, quod post Franciscum Victoriam quasi ei contrarius notavit Molina.

XXIV. Quæsitum memini, an populo alicui liceat cum alio populo pacisci, ut is populus cærti generis fructus, qui alibi non nascuntur, sibi soli vendat. Licere censeo, si is, qui emit populus paratus sit aliis vendere æquo pretio: nam aliarum gentium non interest, a quo emant quod ad desideria naturæ attinet. Lucrum autem alter alteri prævertere licite potest, maxime si causa subsit, ut si qui id stipulatus est populus alterum populum in suam tutelam receperit, sumtusque eo nomine faciendos habeat. Talis autem coëmptio, eo quo dixi animo facta, juri naturæ non repugnat, quanquam solet interdum ob utilitatem publicam legibus civilibus prohiberi.

---

except on account of a delinquency; on which account the rest of the Hebrews took away from the Benjamites the right of intermarriage with them.

XXIII. But what is said of such permissions, is to be understood of such things as are permitted in virtue of natural liberty not taken away by law; not of those things which are permitted by indulgence, as a relaxation of law: for there is no wrong in denying an indulgence. And thus Francis Victoria and Molina may be reconciled.

XXIV. I recollect a question raised, Whether it be lawful for one people to make an agreement with another, that they will sell to them alone fruits of a certain kind, which grew nowhere else. I conceive it to be lawful, if the buying people be ready to sell them to others at an equitable price: for it makes no difference to other nations, from whom they buy what gratifies their natural desires. And one party may anticipate another in a gainful trade; especially if the people making this bargain have taken the other people under its protection, and have incurred expense on that account. Such forestalling and monopoly, made with the intention which I have described, is not contrary to Natural Law; although sometimes it is prohibited by Civil Law, on account of public utility.

---

### CAPUT III.

#### DE ACQUISITIONE ORIGINARIA RERUM, UBI DE MARI ET FLUMINIBUS.

- |  |  |
|--|--|
| I. <i>Originariam acquisitionem fieri per divisionem aut occupationem.</i>           | XII. <i>Talem occupationem jus non dare impediendi transitus innoxii.</i>                        |
| II. <i>Rejiciuntur hic alii modi, ut concessio juris incorporalis.</i>               | XIII. <i>Imperium in partem maris occupari posse, et quomodo.</i>                                |
| III. <i>Item specificatio.</i>   | XIV. <i>Vectigal navigantibus mari ex certis causis imponi posse.</i>                            |
| IV. <i>Occupatio duplex, ad imperium, ad dominium: quae distinctio explicatur.</i>   | XV. <i>De pactionibus, quae populum aliquem ultra certos terminos vetant navigare.</i>           |
| V. <i>Occupationem mobilium lege posse anteverti.</i>                                | XVI. <i>Fluminis cursus mutatus an territorium immutet, cum distinctione explicatur.</i>         |
| VI. <i>Quo jure nitatur dominium infantium et amentium.</i>                          | XVII. <i>Quid sentiendum si alveus plane mutatus sit?</i>  |
| VII. <i>Flumina occupari posse.</i>  | XVIII. <i>Flumen interdum totum accedere territorio.</i>   |
| VIII. <i>An et mare?</i>   | XIX. <i>Res derelictas occupanti cedere, nisi populus dominium quoddam generale occupaverit.</i> |
| IX. <i>Olim in partibus Romani imperii id non licuisse.</i>                          |  |
| X. <i>Natura tamen jus non obstare in parte maris, quae terris quasi clausa sit.</i> |  |
| XI. <i>Quomodo talis occupatio fiat, et quamdiu duret.</i>                           |  |

I. **S**INGULARI jure aliquid nostrum fit acquisitione originaria aut derivativa. Originaria acquisitio olim, cum genus humanum coire posset, fieri potuit etiam per divisionem, ut diximus; <sup>1</sup>nunc per occupationem tantum.

II. Dicat forte aliquis, etiam concessione servitutis, constitutione pignoris aliquid originarii acquiri: sed recte expen-

<sup>1</sup> Potest adhuc hodie per divisionem, ut ostendimus in Notis nostris Gallicis. *J. B.*

---

#### CHAPTER III. *Of the original acquisition of property in things: and herein of the Sea and Rivers.*

I. A thing may become our property by acquisition, original or derivative. Original acquisition formerly, when the human race could meet together and agree, might be made by division; at present it is only made by occupation.

II. It may be said perhaps that property may be originally acquired by being given on conditions, as a farm; or deposited as a

denti apparebit id jus novum non esse nisi modo : nam virtute ipsa inerat in dominio domini.

L. Possideri  
3. § Genera,  
21. D. de Acq.  
Poss.

III. Paulus jurisconsultus acquirendi causis et hanc annumerat, quæ maxime videtur naturalis, si quid ipsi, ut in rerum natura esset, fecimus. Sed cum naturaliter nihil fiat nisi ex materia prius existente, ea si nostra fuerit, continuabitur dominium specie introducta : si nullius, ad occupationis genus hæc acquisitio pertinebit : sin aliena, jam naturaliter nobis solis eam non acquiri infra apparebit.

De Benef.  
vil. 4.

Oraf. xxxl.  
p. 324 D.

IV. 1 De occupatione ergo, quæ post prima illa tempora solus est naturalis et originarius modus, videndum est nobis. In his autem, quæ proprie nullius sunt, duo sunt occupabilia, imperium et dominium quatenus ab imperio distinguitur. Seneca ita hæc duo expressit : *Ad reges potestas omnium pertinet, ad singulos proprietas*. Dion Prusæensis hoc modo : ἡ χώρα τῆς πόλεως ἀλλ' οὐδὲν ἦττον τῶν κεκτημένων ἕκαστος κύριός ἐστι τῶν ἑαυτοῦ. *Regio civitatis est :*

\* *Ad reges potestas omnium pertinet, ad singulos proprietas*] Locus est libro VII. de Beneficiis c. iv. sequitur. c. v. *Omnia rex imperio possidet, singuli dominio. et c. vi. Cæsar omnia habet : sticus ejus privata tantum ac sua*. Symmachus x. epist. 54. *Omnia regitis, sed suum cuique servatis*. Philo libro περὶ φητοουργίας\* οἱ βασιλεῖς καὶ τῶν κατὰ τὴν χώραν ἀπάντων ὄντες κτημάτων δεσπόται, καὶ ὕσαν ἐπικρατεῖν οἱ ἰδιῶται δοκοῦσι, μόνα ταῦτα ἔχει

νομίζονται ἄπερ ἐπιτρόποις καὶ ἐπιμεληταῖς ἐγχειρίσαιεν, ἀφ' ὧν καὶ τὰς ἐτησίους προσόδους ἐκλέγουσιν. *Reges cum sint domini omnium, quæ in privatis possidentur, tamen videntur ea tantum habere quæ procuratoribus et rationalibus suis dispensanda committunt, a quibus annuos recipiunt proventus.* (Pag. 222 B. Ed. Paris.) Plinius *Panegyrico : tandem imperium principis quam patrimonium majus est.* (Cap. 50.)

pledge : but on consideration, it will appear that such ownership is not new, except in its form ; by its own virtue, it resided in the ownership of the former owner.

III. Paulus the Jurist adds, to the enumeration of the causes of acquisition this, if we have made anything, so as to cause it to exist. But since, in the course of nature, nothing can be made except out of pre-existing matter, if that matter was ours, the ownership continues when it assumes a new form ; if the matter was no one's property, this acquisition comes under occupation ; if the matter belonged to another, the thing made is not ours alone, as will appear below.

IV. 1 Therefore we have to consider occupation ; which, after that primitive time, is the only natural and original mode of acquisition. In things which are properly no one's, two things are occupable ; the lordship, and the ownership, so far as it is distinguished from the lordship.

at non eo minus in ea suum quisque possidet. Imperium duas solet habere materias sibi subjacentes, primariam personas, quæ materia sola interdum sufficit, ut in exercitu virorum, mulierum, puerorum quærente novas sedes; et secundariam locum, qui territorium dicitur.

2 Quanquam autem plerumque uno actu quæri solent imperium et dominium, <sup>b</sup>sunt tamen distincta: ideoque dominium non in cives tantum, sed et in extraneos transit, manente penes quem fuit imperio. Siculus libro *de Conditionibus Agrorum: Auctores assignationis, divisionisque, non sufficientibus agris coloniarum, quos ex vicinis territoriis sumsissent, assignaverunt quidem futuris civibus coloniarum; Sed jurisdictio in agris, <sup>2</sup>qui assignati sunt, penes eos remansit, ex quorum territorio sumti sunt.* Demosthenes oratione de Haloneso, agros, qui eorum sunt, quorum est territorium, vocat ἐγκτήματα, <sup>3</sup>qui in alieno κτήματα.

V. In loco autem, cujus imperium jam occupatum est, jus occupandi res mobiles anteverti posse lege civili supra

<sup>b</sup> Sunt tamen distincta] Itaque et apud Apollodorum videas, tum Arcadiæ tum Atticæ terras divisas, uno retinente πάν τὸ κράτος omne imperium. [Biblioth. Lib. III. cap. ix. § 1. et cap. xiv. § 6.]

<sup>2</sup> Amplius. Gozsius legit heic recte *cis agros*, ex vestigio lectionis MSS. et Edd. *cis agris*. Locus est pag. 25. in fin. Editionis, quam curavit idem Vir Doctissimus: qui etiam optime ostendit,

quod divisum fuerat, sed non adsignatum futuris civibus Coloniarum, mansisse illorum, quorum antea fuerat. Quod autem adsignatum fuerat, id omnino accedebat jurisdictioni Coloniarum. Vid. *Antiq. Agrar.* in eodem Volumine, pag. 114. et seqq. Adeoque locus nil ad rem facit. J. B.

<sup>3</sup> Permutat heic Auctor sensum vocum Græcarum. Vide locum Oratoris Græci, pag. 34 B. J. B.

Kings have power over all things (the lordship); individuals have property (ownership.) The city is the king's; but nevertheless in the city each has his own. Lordship has two kinds of matter subject to it; primary, persons, which matter alone sometimes suffices; as in the case of a body of people (men, women, and children,) seeking a new settlement; and secondary, a place, which is called a *territory*.

2 Therefore, though lordship and ownership are commonly acquired by one act, they are really distinct. The ownership may pass not only to citizens, but to strangers; while the lordship remains in the same hands as before. So Siculus *De Conditionibus Agrorum*. Demosthenes uses different words for landed property in our own territory and in another.

V. In a place in which the lordship is already occupied, the right of occupying moveable things (as wild beasts, birds, &c.) may be barred



diximus. Est enim hoc jus ex jure naturæ permittente, non præcipiente, ut liceat semper. Neque enim id requirit humana societas. Quod si quis dicat videri jus gentium esse, ut id liceat: respondebo, etiamsi in aliqua parte orbis id communiter ita receptum sit, aut fuerit, non tamen habere vim pacti inter gentes, sed esse jus civile plurium gentium distributum, quod a singulis tolli potest. Et talia multa sunt, quæ juris gentium vocant jurisconsulti, ubi de rerum divisione et acquirendo dominio agitur.

VI. Notandum et hoc, si solum jus naturale spectamus, dominium non dari nisi in eo, qui ratione utitur. Sed jus gentium ob utilitatem communem introduxit, ut et infantes, et furiosi dominia accipere et retinere possent, personam illorum interim quasi sustinente humano genere. Sed nimirum humana jura multa constituere possunt præter naturam: contra naturam nihil. Ideo dominium hoc, quod favore infantium et his similium, consensu gentium humanius viventium introductum est, stat intra actum primum, nec ad actum secundum, ut loquuntur scholæ, potest pertinere, id est, ad habendi, non ad per se utendi jus pertinet. Nam alienatio et si qua huic sunt similia, in ipsa sui natura includunt actum utentis ratione voluntatis, quæ in talibus existere

---

by the Civil Law, as we have said (B. II. c. ii. § v.). For the right to take such things is from a permission of Natural Law; not from a command, directing that there shall always be such liberty. Nor does human society require that it should be so. If any one should say that it appears to be a part of *jus gentium* that such a liberty should exist; I reply, that although in any part of the earth this be or should be so received, yet it has not the force of a general compact among nations: but is the Civil Law of several nations distributively, which may be taken away by nations singly. There are several such points which the jurists say are *juris gentium*, in what relates to the division and acquisition of property.

VI. It is to be observed also, if we regard Natural Law alone, that there is no ownership except in a creature endowed with reason. But the *jus gentium* has introduced an assumption, on the ground of common utility, that infants and insane persons can receive and retain ownership, the human race, as it were, performing their parts for them. And in fact many things besides nature may constitute Rights, though nothing can constitute Rights against nature. Therefore this ownership which is thus introduced in favour of infants and the like by the custom of civilized nations, stops at the *primus actus*, the potential fact

non potest. Quo non male referas illud Pauli apostoli, *Gal. iv. 1.* pupillum quanquam rerum paternarum dominum, dum ejus est ætatis, nihil differre a servis, exercitio domini scilicet. De mari cœpimus supra aliquid dicere, quod nunc absolvendum est.

VII. Flumina occupari potuerunt, quanquam nec supra nec infra includuntur territorio, sed cum aqua superiori et cum inferiori, aut cum mari cohærent. Sufficit enim quod major pars, id est, latera clausa sunt ripis, et quod comparatione terrarum exiguum quid est flumen.

VIII. Ad hoc exemplum videtur et mare occupari potuisse ab eo, qui terras ad latus utrumque possideat, etiamsi aut supra pateat ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris, ut non cum terris comparata portio earum videri possit. Et quod uni populo aut regi licet, idem licere videtur et duobus aut tribus, si pariter mare intersitum occupare voluerint: nam sic flumina, quæ duos populos interluunt, ab utroque occupata sunt, ac deinde divisa.

IX. 1 Fatendum est in partibus cognitis Romano imperio a primis temporibus ad Justinianum usque, juris gentium fuisse, ne mare a populis occuparetur, etiam quod jus piscandi

of having; and does not go on to the *actus secundus*, the operative fact of using. For alienation and similar processes in their very nature include the use of reason, which cannot exist in such agents. To which we may refer, *Gal. iv. 1, the heir, so long as he is a child, &c.*

VII. We have above begun to speak of the sea; we must now finish what we have to say on the subject.

Rivers may be held as by occupation, though neither their upper nor lower extremity be included in the territory; but cohere with superior or inferior water, or with the sea. It is sufficient that the greater part, that is, the sides, are inclosed with banks, and that a river is something small in comparison with the land.

VIII. By this it appears that a portion of the sea also may be occupied by him who possesses the land on each side: although it be open at one end, as a bay, or at both, as a strait; provided it be not such a portion of the sea as is too large to appear part of the land. And what is lawful to one people or king, seems also to be lawful to two or three, if they, in like manner, wish to occupy the sea which lies among their dominions. And thus two rivers which flow between two peoples are occupied by both, and thus are divided.

IX. 1 It must be confessed, however, that in the parts of the

I. lib. II. § 1.  
D. de Rer.  
Div. § 1.  
Instit. de  
Rer. Div.

L. Vendit. 13.  
Comm. Præd.  
Lib. III. Ne  
quid in loco  
Publico, § 1.

De Rer. Div.  
§ 1.

L. Quod in  
littore. D. de  
Acq. Rer.  
Dom.

attinet. Nec audiendi sunt qui existimant, cum in jure Romano mare omnium commune dicitur, commune civium Romanorum intelligi. Nam primum voces ita sunt universales, ut hanc restrictionem non ferant. Nam quod Latine mare omnium commune dicitur, explicat Theophilus, κοινὸν πάντων ἀνθρώπων. Ulpianus mare omnibus natura patere dixit, et ita omnium esse sicut aër. Celsus, maris communem esse usum omnibus hominibus. Præterea manifeste 'distinguunt jurisconsulti publica populi, in quibus et flumina, ab his communibus. Ita in institutionibus legimus: *Quædam naturali jure c communia sunt omnium, quædam publica: Naturali jure communia sunt omnium hæc, aër, aqua profluens, et mare, et per hoc littora maris. Flumina autem omnia et portus publica sunt: et apud Theophil. φυσικῶ μὲν οὖν δικαίῳ κοινὰ πάντων ἀνθρώπων ἐστὶ ταῦτα, ὁ ἀήρ, τὸ ὕδωρ τὸ ἀένναον, θάλασσα. Μοχ: ποταμοὶ δὲ πάντες καὶ λιμένες πουβλικοὶ εἰσι, τοῦτ' ἐστὶ τοῦ δήμου τοῦ Ῥωμαϊκοῦ.*

2 Sed et <sup>d</sup>de littoribus dixit Neratius non ita esse publica, ut quæ in patrimonio sunt populi, sed ut ea, quæ primum a natura prodita sunt, et in nullius adhuc dominium pervene-

<sup>a</sup> *Communia hæc omnium, dicuntur etiam Publica a priscis Ictis. Vide Clariss. NOODT. Probab. Jur. Lib. I. cap. vii. viii. Quoad rem ipsam, vel non satis inter se consensisse, vel non satis accuratas habuisse notiones videntur Veteres illi Sapientes. Sed de eo non est heic agendi locus. J. B.*

<sup>c</sup> *Communia sunt omnium] Michael Attaliates: τινὰ δὲ πάντων εἰσιν, οἷον ὁ ἀήρ, τὸ ῥέον ὕδωρ, ἢ θάλασσα, ὁ ἀγαλῶδε τῆς θαλάσσης. quædam sunt omnium, ut aër, ut aqua profluens, ut mare. et litus maris. (Tit. II. Pragm.)*

<sup>d</sup> *De littoribus] In Basilicorum Eclogis Lib. I. tit. I. c. 13. οἱ ἀγαλοὶ ἐν*

earth known to the Roman empire from the earliest times down to Justinian, it was a part of the Law of Nations that the sea could not be occupied by any people, even for purposes of fishery. Nor are they to be attended to who say, that since, in the Roman Law, the sea is called *commune omnium*, common to all, it is to be understood as common to Roman citizens. For, in the first place, the expressions are too general; as in Theophilus, Ulpian, Celsus. [Sec.] And next, the jurists distinguish these *publica populi*, public property of one people, from things common to all. So in the Institutions and Theophilus. [Sec.]

2 As to shores of the sea, Neratius said that they are not public as belonging to any one people, but as still in a state of nature, never having come to belong to any, not even any people. This seems to be contradicted by what Celsus says, that the shore within the bounds of

runt, id est, ne populi quidem ullius: cum quo responso pugnare videtur, quod Celsus scripsit: *Littora, in quæ populus Romanus imperium habet, populi Romani esse arbitror: maris autem usum communem omnibus hominibus.* Sed conciliari videntur ita hæc posse, si dicamus Neratium de littore loqui, quatenus usus ejus navigantibus, aut prætervehentibus est necessarius. Celsum vero quatenus ad utilitatem perpetuam assumitur, puta ad ædificium permanens: quod a prætore impetrari solere Pomponius nos docet, ut et jus ædificandi in mari, id est, in parte littori proxima, et quæ littori quasi accensetur.

d. l. littora.  
D. Ne quid  
in loco publ.

L. Quamvis.  
50. D. de Acq.  
Dom.

X. 1 Hæc quanquam vera sunt tamen ex instituto non ex naturali ratione provenit, quod mare eo quo diximus sensu occupatum non est, aut occupari jure non potuit. Nam et flumen publicum est, ut scimus, et tamen jus piscandi in diverticulo fluminis occupari a privato potest: sed et de mari dictum a Paulo est, si maris proprium jus ad aliquem pertineat, uti possidetis interdictum ei competere; quoniam ad privatam jam causam pertinet non ad publicam hæc res: utpote cum de jure fruendi agatur, quod ex privata causa contingit, non ex publica: ubi haud dubie de exigua agit maris por-

L. Si quis-  
quam. 7. D.  
de Divers.  
Temp. Præz.  
1. Sane 14.  
D. de Injur.  
ix. 1.

τῆ πάντων ἐξουσία εἰσι· littora in omnibus sunt potestate. Vide et libro LIII. tit. vi.

⁵ Vocem perpetuam addidi, quæ excidit in omnibus Editionibus, et quam deesse manifesto patet ex oppositione. J. B.

⁶ Ex instituto] Quo ipso instituto

usi et Angli contra Danos: vide optimum Camdenum in regno Elisabethæ anno c10 Ioc.

⁷ De exigua agit maris portione, quæ in fundum privatam admittitur] Salustius (*Bell. Catil.* c. 13): a privatis compluribus subversos montes, maria constructa. Horatius Lyricorum libro II.

the Roman authority belongs to the Roman people; but that the sea is common. The two may be reconciled, if we suppose that Neratius meant the use of the shore as far as it is used by navigators or travellers; but Celsus, so far as it is taken up for some permanent use, as for a building. For this, as Pomponius teaches us, was obtained only by application to the judge, as also the right of building in the sea.

X. 1 Though this is so, yet that the sea, in the sense which we have spoken of, is not occupied, nor can lawfully be occupied, is a result of institution, not of natural reason. For a river is public property, as we know; and yet the right of fishing in a certain bend of the river may belong to a private person by occupation: and Paulus pronounced, that if any one could have property in the sea, he might obtain a sentence of the court in the usual form, *uti possidetis*, since the case would be a private, not a public one; but in this he speaks, doubt-

tione, quæ in fundum privatum admittitur: quod <sup>5</sup>a Lucullo et aliis factum legimus. Valerius Maximus de C. Sergio Orata: *peculiararia sibi maria excogitavit, æstuariis intercipiendo fluctus*. Sed idem postea contra veterum Jurisconsultorum responsa ad <sup>h</sup> *πρόθυρα*, id est, vestibula in Bosphoro Thracico produxit Leo Imperator, ut ea quoque septis quibusdam, quas *ἐποχὰς* vocabant, includi et privatim vindicari possent.

2 Quod si privatorum fundis aliquid maris potest accedere, quatenus inclusum nempe est, et ita exiguum, ut fundi portio censi possit, nec quo minus id fiat repugnat jus naturæ; quidni et portio maris inclusa littoribus ejus fiat populi, eorumve populorum, cujus quorumve sunt littora, dum ea pars maris ad territorium comparata non major sit quam diverticulum maris comparatum ad magnitudinem fundi privati?

carmine xviii. (vers. 20):

Mariquo Ballis obstrepentis urges  
Summovere littora:

Et libro III. carmine I. (vers. 33):

Contracta pisces æquora sentiunt  
Jactis in altum mollibus —

Velleius Paterculus (Lib. II. c. 33):

*Injectas moles mari et receptum suffossis montibus mare*. Seneca in excerptis controversiarum libro v. contr. v. *Maria submoventur projectis molibus*. Plinius de Terra Lib. II. c. lxiii. *Ut freta admittamus, eroditur aquis*. Stagna stupenda admissa mari dixit Lampridius

Severo. (Cap. 26). Cassiodorus IX. c. vi. *Quantis ibi molibus marini termini decenter invasi sunt, quantis in visceribus æquoris terre promota est?* Tibullus:

Claudit et indomitum moles mare, lentus ut  
intra

Negligat hibernas piscis abesse minas.

(Lib. II. *Eclog.* vi. 27.) De talibus piscinis maritimis agit Plinius libro xxxi. cap. vi. Columella *Rei Rusticæ* libro VIII. c. xvi. et xvii. ubi hoc inter alia: *lautitias locupletum maria ipsa Neptunumque clausisse*. Similia habet Am-

less, of a small part of the sea, such as can be taken into private grounds, as was done by Lucullus and others. C. Sergius Orata made seas of his own by shutting up estuaries, as Valerius says. And this authority was used by Leo the Emperor, for appropriating the entrance of the Bosphorus by shutting it with piers.

2 Since a portion of the sea may become part of a private estate, namely, if it be included in the estate, and so small as to seem part of it, and if Natural Law does not prohibit this; why should not a portion of the sea included within the territory of a people or of several peoples be the property of those whose the shores are? provided that the size of that portion of the sea compared with the territory be not larger than the creek of the sea compared with the estate. And it is not a reason against this, that the sea is not included on all sides, as we may understand by the example of a river, and of the sea admitted into the heart of a city.

Nec obstare quod mare non undique includatur, exemplo fluminis, intelligi potest, et exemplo maris ad villam admissi.

3 Sed multa, quæ natura permittit, jus gentium ex communi quodam consensu potuit prohibere. Quare quibus in locis tale jus gentium viguit, neque communi consensu sublatum est, maris portio quamvis exigua, et maxima sui parte inclusa littoribus, in jus proprium populi alicujus non concedet.

XI. Verum notandum etiam, si quibus in locis jus illud gentium de mari receptum non esset, aut sublatum, tamen ex eo solo, quod terras populus occuparit, mare occupatum colligi non posse: nec animi actum sufficere, sed actu externo esse opus, unde occupatio possit intelligi. Deinde vero si deseratur possessio ex occupatione nata, jam mare redire ad veterem naturam, id est, ad usum communem: quod de inædificato

brosius Hexaëmero v. c. x. et de *Nabuthæ* cap. iii. et Martialis aliquot locis. [Exempli gratia, libro x. *Epigr.* xxx. vers. 19, et seqq.]

¶ *A Lucullo* Varro de eo: *Ad Neapolim L. Lucullus, posteaquam perfodisset montem, et maritima flumina immisisset in piscinas, quæ reciproca fuerent, ipse Neptuno non cederet eo piscatu.* (*De Re Rust.* Lib. iii. cap. 17). Plutarchus ejus vita: *καὶ τροχῶν θαλάσσης καὶ διαδρομῶν ἰχθυοφόρων τοῖς οἰκητηρίοις περιλίσσοτος, καὶ διαίτας ἐναλίους κτιζόντος.* (pag. 518 c.) Cum

*ipse maris alveos et plenos piscibus euripos villis suis circumdaret, inque ipso mari cænacula fabricaret.* Plinius libro ix. c. liv. *Lucullus exciso monte juxta Neapolim, majore impendio quam villam ædificaverat, euripum et maria admisit: qua de causa Magnus Pompeius Xerzem togatum eum appellabat.*

<sup>b</sup> *Πρόθυρα*] Vide Leonis Novellas LVII. CII. CIII. CIV. Attaliam pragmaticorum tit. xcv. Harmenopolium Lib. II. tit. 1. § *περὶ προθύρων.* Vide et summum virum Jacobum Cujacium *Observat.* XIV. 1.

3 But many things which are permitted by nature, the Law of Nations, by a bond of common consent, has prohibited. Wherefore in those places in which such a Law of Nations is in force, and is not suspended by common consent, any portion of the sea, even though small and mostly included by shores, is not the property of any people.

XI. It is further to be noted, that since, in those places in which that Law of Nations concerning the sea is not received, or is abolished, it is not to be inferred from the mere occupation of the land, that the sea is occupied: so also, that a mere mental act does not suffice for the occupation of the sea; but that there is need of some external act [as the presence of ships] by which the occupation may be understood to take place. And again, that if the possession which arose from occupation be given up by desertion, the sea forthwith returns to a state of nature; that is, to community of use; which was declared by Papinian to be the law respecting a shore not built on, and a fisher-river.

L. Præzer.  
45. D. de  
Usurp. et  
Cauc.

littore respondit Papinianus, et de piscatione in fluminis diverticulo.

XII. Illud certum est, etiam qui mare occupaverit navigationem impedire non posse inermem et innoxiam, quando nec per terram talis transitus prohiberi potest, qui et minus esse solet necessarius et magis noxius.

<sup>1</sup> *Imperium in maris partem*] Philo de [*plantat. Noa*, p. 223 κ. *Ed. Paris.* ubi agit] de *Regibus*: καὶ τὰ ἀπειρα πλήθει καὶ μεγέθει πελάγη προσεκτήσαντο· etiam maria numero infinita, immensa magnitudine, ad terras adjecere. Lycophon [pag. 84, vers. 4. *Edit. Meurs.*]:

Ἦς καὶ θαλάσσης σφέτρα καὶ μοναρχίαν·  
Terræ marisque sceptris, regnorumque opea.

[Habebunt scil. Romani] Virgilius (*Georg.* i. 31):

Teque sibi generum Tethys omat omnibus undis.  
Julius Firmicus (*Mathes. Lib.* vi. c. 1):  
maris ac terræ dominia possidentes.  
Nonnus (*Dionys. Lib.* xliiii. pag. 1106, vers. 14. *Ed. Weck.*):

Βερόν κράτος ἔσχε θαλάσσης.

Beroe pelagus ditione tenebat.

*Termini regnorum Suetiæ in medio freti Ore sunt.* Johannes Magnus in *Archiepiscopis Upsalensibus* cap. xv. *De Tyro Curtius* (*Lib.* iv. c. 4): *Mare non vicinum modo, sed quodcumque classes ejus adierunt, dititionis suæ fecit.* Unde proverbium: *Tyria maria* apud Festum. *Isocrates de Lacedæmoniis et Atheniensibus* (*In Panath.* p. 243 c. *Ed. Steph.*): συνέβη ἑκατέραν κυρίαν γενέσθαι τῆς κατὰ θάλατταν· ἢν ὑπότροποι ἂν κατὰσχωσιν, ὑπηκόνους ἔχουσι τὰς πλείστας τῶν πόλεων· *Sic evenit, ut civitas utraque terram adipisceretur eam, quæ mari ab ipsis possesso adjaceret, plurimasque urbes haberet sibi obsequentes.* Demo-

sthenes *de Lacedæmoniis in Philippica* III. (pag. 49 c.) θαλάσσης ἤρχον καὶ γῆς ἀπάσης· *Et mare omne et terras tenebant.* Scriptor vitæ Timothei: *quo facto Lacedæmonii de diuturna contentione destiterunt, et sua sponte Atheniensibus imperii maritimi principatum concesserunt.* (*Corn. Nepos* c. 2.) Scriptor orationis de Halonoso, quæ est inter Demosthenicas, de Philippo loquens Macedone: οὐδὲν ἄλλο ἢ τοῦτο ἀξίωσιν ὑφ' ὑμῶν εἰς τὴν θάλασσαν κατασταθῆναι, καὶ ἁμολογήσασαι ὑμᾶς ὡς οὐκ ἄνου Φιλίππου οὐδὲ τὴν ἐν τῇ θαλάσσει φυλακὴν δυνατοὶ εἶσθε φυλάττειν· (*Pag.* 31 v): *Nihil ille querit aliud, quam a nobis in possessione constitui maris, et a nobis confessionem exprimere, nos absque ipso nec maris custodiam posse retinere.* Julianus Imperator de Alexandro, mollitum eum esse bellum hoc animo: ὅπως γῆς τε ἀπάσης καὶ θαλάττης κύριος γένοιτο· *ut terra marisque totius dominus feret.* (*Orat.* III. p. 107 c. *Edit. Spanh.*) Hujus successor Antiochus Epiphanes apud Gorioniden: *Nonne terra et mare mea sunt?* De alio ejusdem successore Ptolemaeo Theocritus (*Idyll.* xvii. 76):

Πολλὰς δὲ κρατεῖ γαίης, πολλὰς δὲ θαλάσσης.

Lateque imperitat terris, lateque profundo.

Item (*Ibid.* vers. 91):

θάλασσα δὲ πᾶσα καὶ αἶα,

Καὶ ποταμοὶ κελάδοντες ἀνάσσονται Πτολεμαίῳ.

XII. This is certain, that even he who holds the sea by occupation cannot prevent an unarmed and harmless navigation upon it; since even a transit of this character over land cannot be prohibited, which nevertheless is both less necessary, and more noxious\*.

\* The right of transit by land, which is here described as "more noxious," and used as an argument, was proved by assuming it to be absolutely innoxious. See B. II. c. ii. § xiii. W. W.

XIII. 1 Ut autem solum <sup>1</sup>imperium <sup>6</sup>in maris partem sine alia proprietate occupetur, facilius potuit procedere: neque arbitror jus illud gentium, de quo diximus, obstare. Argivi olim cum Atheniensibus expostularunt, quod suo mari Spartanos Argivorum hostes transire sivistent: quasi violato fœdere, quo cautum erat, ne alter populus hostes alterius

Bonius Tit. de Aquis. n. 36. allegans Bal. Cepoll. et alios. Vide L. *Untam* c. de *Class.* Lib. vi. Thucyd. v. 86.

omnis tellusque fretumque

Aitæonisque annos sub rege jacent Ptolemæo.

Tempus est ad Romanos veniamus. Scipioni majori sic Annibal in Livio (Lib. xxx. c. 30): *Carthaginenses inclusi Africæ littoribus, vos, quando Diis ita placuit, externa etiam terra marique videamus regere imperia.* De minore Scipione Claudianus (*De sec. Cons. Stilicon.* Præf. vers. 7. 8):

patris primo cum manus ultor  
Subderet Hispanum legibus Oceanum.

Itaque mare internum passim suum vocant Romani, Sallustius, Florus, Mela, alii. Sed plus adjicit Dionysius Halicarnassensis (*Antiq. Rom.* Lib. i. c. 3): *πάσης κρατεί θαλάσσης οὐ μόνον τῆς ἐντὸς Ἡρακλείων σπηλαίων, ἀλλὰ καὶ τῆς ἄκεαντίδος ὅση πλείσθαι μὴ ἀδύνατός ἐστι· Populus Romanus omni mari imperat, non modo ei, quod inter columnas est Hercules, sed et oceani, in quantum navigatur.* De iisdem Dion Cassius: *πάσης σχεδὸν βασιλεύοντες γῆς καὶ θαλάσσης· omni ferme imperant terræ marique.* Appianus in præfatione describens Romani imperii magnitudinem, sub eo ponit mare Euxinum, Propontidem, Hellespontum, Ægæum, Pamphylium, et Ægyptium mare. Pompeio datum imperium in omne id mare, quod intra Herculeas est columnas: ita Plutarchus et Appianus. Philo in *Flaccum* (pag. 980 B): *ἀφ' οὗ τὴν ἡγεμονίαν ὁ Σεβαστός οἶκος ἀνήψατο γῆς καὶ θαλάσσης· ex quo Cesarum domus*

*terræ marisque imperium adeptæ est.* De Augusto Ovidius (*Metam.* xv. 831):  
pontus quoque serviet illi.

Inscriptio in ejus honorem [Apud Gruter. p. 194. num. 4. Edit. prim.]: *Orbe terra et mari pacato. Augustus Janum Quirinam terra marique pace parta ter clausit, teste Suetonio (Aug. c. 22): qui de eodem (cap. 49); Classe Miseni et alteram Ravennæ ad tutelam superi et inferi maris collocavit.* Ad Tiberium Valerius Maximus (*Præfat.* p. 2): *Penes te hominum Deorumque consensus maris et terræ regimen esse voluit.* De eodem Philo (*De Legat. ad Caium*, pag. 1012 c): *γῆς καὶ θαλάσσης ἀναψάμενον κατὰ κράτος· qui imperio terram ac mare complectebatur.* Idem de Caio Tiberii successore: *Γάϊον μετὰ τὴν Τιβερίου τελευτὴν παρεληφότα τὴν ἡγεμονίαν πάσης γῆς καὶ θαλάττης.* (Ibid. pag. 993 c.) *Caium qui post mortem Tiberii imperium omne terras marisque suscepit.* Vespasianum Josephus vocat, (*De Bell. Jud.* Lib. III. cap. 8. § 9. *Ed. Hudson.*) *δεσπότην καὶ γῆς καὶ θαλάσσης· terræ marisque dominum: idem jus Antonino multis in locis Aristides tribuit. Procopius Imperatoris status affectas narrat orbem tenentes, ὅτι γῆ τε αὐτῶν καὶ θαλάσσα δεδούλωται· quod ei subjecta esset terra et mare.* (*De Edific. Justin.* cap. 2. *de Augustæo.*) Nicetas Patricius Adriatici littoris servator memoratur in literis Ludovici II. (Apud GOLDAST. *Constit. Imperial.* Tom. 1.

XIII. 1 The empire of the sea, claimed over a portion of it without any other property [on which it depends] might easily proceed from such claims as we have spoken of, nor do I conceive that the Law of Nations, of which we have spoken, would stand in the way. It has often been asserted and conceded; thus the Argives expostulated with the Athenians for allowing the Spartans to pass over the sea, whereas



Idem, iv. 118.
p. 211 A.
 sineret ire διὰ τῆς ἐαυτῶν, per sui imperii loca. Et in induciis annalibus belli Peloponnesiaci permittitur Megarensibus navigare mari quod ad ipsorum sociorumque terram pertineat, τῇ θαλάσῃ ὅσα ἂν κατὰ τὴν ἐαυτῶν καὶ κατὰ τὴν ξυμμαχίαν. Sic θάλασσαν τὴν τῶν Ῥωμαίων πᾶσαν, mare omne quod Romani est imperii, dixit Dion Cassius libro xlii. Themistius de Romano Imperatore : τὴν γῆν καὶ θάλασσαν ὑπὲρ ἑαυτῶν ἔχων : *habens sibi subditam terram et mare*. Oppianus ad Imperatorem. [*Halieut.* III. 4.]

σοῖς μὲν γὰρ ὑπὸ σκῆπτροισι θάλασσα

ἔδεται.

tuis etenim sub legibus æquor

Volvitur.

p. 415 D.
 Et Dion Prusæensis, in altera ad Tarsenses, multa ei civitati ab Augusto ait concessa, inter alia ἐξουσίαν τοῦ ποταμοῦ, καὶ τῆς θαλάττης τῆς κατ' αὐτὴν *jus in amnem Cydnium et proximam maris partem* : Et apud Virgilium legimus (*Æn.* I. 236) :

Qui mare, qui terras omni ditione tenerent.

pag. 118). Constantinus Monomachus in historia dicitur γῆς καὶ θαλάσσης κύριος καὶ δεσπότης *terra marisque Imperator ac dominus*. Et inter themata, id est, provincias Romani imperii, ponitur mare Ægeum : (apud Constantinum. Porphyrogenn. Lib. i. Them. 17). Francos mari ad Massiliam et circum imperasse narrat Procopius *Gothicorum* III. (cap. 33). De jure Venetæ reipublicæ vide Parutam libro VII. et specialem historiam de Uscochis. Addi his possunt jurisconsulti recentiores ad c. ubi periculum, 3. de electione in VI. Bartolus, Angelus, Felinus in c. ad liberandum, 17. in principio: de Judæis.

Baldus ad titulum digestorum de rerum divisione col. 2. Afflictus in tit. que sint regalia. Cacheranus decisione Pedemontana 155. num. 4. ubi ex Baldo dicit totum mundum hoc jure uti. Albericus Gentilis advocacionis Hispanicæ I. 8. [In loco, quem Auctor adfert, tamquam ex Dione Cassio, videtur memoria lapsus hunc Scriptorem laudasse pro THEMISTIO, apud quem saltem totidem verbis reperies verba adducta, *Orat.* v. pag. 137, in fin. *Edit. Petav.* 1618].

<sup>6</sup> Non potest heic distingui *imperium a dominio* ; ut in Notis nostris Gallicis, Deo dante, ostendemus. Vide interim, circa totam hanc questionem de Domi-

the treaty was that neither party should allow the enemies of the other to pass through their domain.

And in the truce, in the Peloponnesian war, the Megareans are permitted to navigate the sea contiguous to their and their allies' shores. So the sea is spoken of as part of the Roman empire, by Dio Cassius, Themistius, Appian, Dio Prusæensis, Virgil, Gellius. So the Massilians and the Sinopians.

2 The empire of a portion of the sea is, it would seem, acquired in the same way as other lordship ; that is, as above stated, as belong-

Apud Gellium: *Fluminum quæ in mare, qua imperium Romanum est, fluunt.* Notat Strabo Massilienses multa cepisse spolia cum præliis navalibus vicissent *τοὺς ἀμφισβητοῦντας τῆς θαλάσσης ἀδίκως: eos, qui injuste de mari controversiam moverent.* Idem Sinopen ait impetrasse mari in Cyaneas. Lib. x. 7.  
Lib. iv. p. 180.  
Lib. xii. p. 545.

2 Videtur autem imperium in maris portionem eadem ratione acquiri, qua imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt, qui in proxima maris parte versantur, nec minus quam si in ipsa terra reperirentur.

XIV. Quare nec contra jus naturæ aut gentium faciet, qui recepto in se onere tuendæ navigationis juvandæque per ignes nocturnos et brevium signa, <sup>k</sup> vectigal æquum imposuerit navigantibus, quale fuit Romanum vectigal Erythræum, <sup>7</sup> ob sumtus exercitus maritimi adversus piraticas excursiones: et <sup>1</sup> quod in ponto Byzantini exigebant *διαγώγιον*, et quod jam olim Athenienses occupata Chrysopoli exegerant in ponto eo-

nio Maris, Dissertationem singularem Ampliss. ВΥΝΚΕΒΣΗΟΕΣΚΙΙ; et quæ diximus ad PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. iv. cap. v. J. B.

<sup>k</sup> *Vectigal æquum*] Rhodii olim portorium de insulis exegere, etiam de Pharo apud Alexandriam, teste Ammiانو Lib. xxii. (cap. 16. p. 373). De Venetis, qui in Gallia, Cæsar: *In magno impetu maris atque aperto, paucis portibus interjectis quos tenent ipsi, omnes fere qui eodem mari uti consueverunt, habent vectigales.* (*Bell. Gall.* III. 8). *Florus de Romanis: Pudebat nobilem populum ablato mari, raptis insulis, dare*

*tributa quæ jubere consueverat.* (Lib. II. c. 6). Plinius VI. c. xxii. Annii Plocami meminit, qui maris rubri vectigal a fisco redemerat: idem capite sequenti de mari agens, quo in Indiam navigatur: *Omnibus annis navigatur sagittariorum cohortibus impositis. Etenim pirata maxime infestant.* Disputationes egregias de modo vectigalis vide in Elisabetha Camdeni Anno ClO IC LXXXII. et ClO ICo II.

<sup>7</sup> Qui in ora libri hęc laudatur, Plinius, nil tale habet; nisi quod refertur ab auctore, in Nota, de Annio Plocamo, ex Lib. VI. 22. J. B.

<sup>1</sup> *Quod in ponto Byzantini exigebant*]

ing to a person, or as belonging to a territory: belonging to a person, when he has a fleet which commands that part of the sea; belonging to a territory, in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land.

XIV. Hence he does nothing contrary to the Law of Nature and Nations, who, undertaking the care of assisting navigation by providing lighthouses and buoys sand-banks, imposes an equitable tax upon navigators; like the Roman Erythræan tax to meet the expense of the expedition against the pirates; and the passage dues which were

Lib. iv. 44.  
p. 360 A, B.

dem, memorante utrumque Polybio: et quod in Hellesponto olim Athenienses eosdem exegisse ostendit <sup>m</sup>Demosthenes in Leptinen, suo autem tempore Romanos Imperatores in arcana historia memorat Procopius.

XV. 1 Inveniuntur exempla fœderum, quibus populus alter alteri populo se obstringit, ne ultra certum terminum naviget. Sic inter reges accolæ rubri maris et Ægyptios convenerat olim, ne Ægyptii in id mare venirent ulla navi longa, oneraria non plus una. Sic inter Athenienses et Persas <sup>n</sup>Cimonis ætate placuerat, ne qua navis Medica armata intra Cyaneas et Chelidonia navigaret; intra Cyaneas et

Philostr. de  
Vita Apoll.  
lib. 11.  
Plut. Cim.  
p. 487 A.  
Diod. xl. 61.  
Aristid. in  
Panath. p.  
324. Tom. 1.

Meminit Byzantini vectigalis Herodianus Severo. (Lib. III. c. i.) Procopius, tum in vulgata tum in arcana historia, (cap. 25) etiam veteris vectigalis in Hellesponto meminit, novi autem ad fauces maris Euxini et in freto Byzantino. Byzantini exactionem fuisse ad eadem Blachernianam, Hellespontiacum Abydi docet Theophanes. Abydi illud δεκατευτήριον, id est, vectigalarium decimæ, vocat Agathias libro v. (cap. 5) minuit id Irene. Immanuel Comnenus Imperator monasteriis aliquibus concessit θαλάσσια δίκαια, obventiones e mari. Docet Balsamo in Concilii Chalcedonenais canonem IV. et Synodi VII. canonem XII.

<sup>m</sup> Demosthenes in Leptinen] Idem ibidem accepta Byzantio dominos maris factos ait Athenienses. Ulpianus Scholiastes solutam ibi ait decimam. (Pag. 134 c. Tom. II. Ed. Basil. 1572).

<sup>n</sup> Cimonis ætate] Hæc est illa εἰρήνη

περιβόητος, nobilissima pax, Plutarcho, qua et hoc convenerat, ut Persæ a mari tantum spatii absisterent quantum ferret equi cursus, id est, XL. stadia. Meminit et Isocrates Panathenico. [Locus est pag. 244 z. Ed. H. Steph. Sed Auctor noster dixit *quadraginta stadia*, pro *quadringentis*: nam totidem continebat ἵππων δρόμος, ut exponitur a Plutarcho, pag. 491. τετρακοσίων σταδίων ἑνός. Et res ipsa clamat: quadraginta enim stadia conficiunt tantum unum *milliare* vulgare, seu ter mille passuum Geometricorum, cum duabus tertiis: quis autem Equus, per unum diem, non longe majus spatium itineris absolveret? Vide DEMOSTHEN. Orat. de Fals. Legat. pag. 273 A. DIOD. SICUL. Lib. XII. cap. 4. et ARISTID. Orat. in laudem Rom. p. 349. Tom. I. Aliud est ἵππικόν, de quo alibi PLUTARCHUS, Vit. Solon. pag. 91 c. nimirum spatium, quod emetitur Equus in Agonibus, et

levied by the Byzantines in their sea; and those which the Athenians levied in the same sea when they occupied Chrysopolis: [See Polybius.] and what the Athenians formerly had levied in the Hellespont, as Demosthenes shews; and the Roman emperors, as Procopius mentions, in his time.

XV. 1 There are examples of treaties by which one people bound itself to another not to navigate beyond certain boundaries. Thus the kings of the region on the Red Sea, and the Egyptians, had a convention that the Egyptians should not come upon that sea with any ship of war, nor with more than one merchant-vessel. So the Athenians and Persians at the time of Cimon agreed that no armed Median ship should sail within the Cyanean and Chelidonian islands;

Phaselidem post prælium ad Salaminem: in annalibus induciis belli Peloponnesiaci, ne Lacedæmonii navigarent longis navibus, sed aliis navigiis, quæ ferrent ponderis non amplius quingentis talentis: et primo fœdere, quod statim ab exactis regibus °Romani cum Carthaginiensibus fecerant, convenerant, ne Romani Romanorumve socii ultra Pulchrum promontorium navigarent, extra quam si tempestatis aut hostium vi compulsi essent: qui vi compulsi advenissent, nihil sumerent præter necessaria, et intra diem quintum abscederent. Et <sup>P</sup>in secundo fœdere, ne Romani ultra Pulchrum promontorium, Mastiam et Tarseium prædas agerent mercatumve irent. In pace cum Illyriis, ne Illyrii ultra Lissum <sup>°</sup> pluribus quam duobus lembis iisque inermibus navigarent. In pace cum An-

Thucyd. iv. 118.

Polyb. iii. 22.

App. *III*. p. 760.

quatuor erat stadiorum, ut ipse statim exponit. Hæc duo tamen confudit J. CASPAR EISENSCHMID. in libro ceteroquin utilissimo *De Ponderibus et Mensuris Veterum* &c. p. 113. J. B.]

° Romani cum Carthaginiensibus]

Servius ad illud IV. *Æneidos* :

Littora littoribus contraria.

Quia in fœdere cautum fuit, ut neque Romani ad littora Carthaginiensium accederent, neque Carthaginienses ad littora Romanorum. Simile fœdus Romanorum cum Tarentinis: μή πλείν Ῥωμαίους πρόσω Λακινίας ἀκρας· ne Romani ultra promontorium Lacinium navigarent; est hoc in excerptis ad legationes ex Appiano. [Excerpt. Fulvii Ursini, num. 5. pag. 444. *init.*] Mersos a Pœnis externos, qui in Sardininiam vel ultra columnas navigarent, tradit Strabo libro XVII.

<sup>P</sup> In secundo fœdere] Erat et hoc in eo, ne Romani in Africam aut Sardi-

niam appellerent nisi commeatus accipiendi aut naves reficiendi causa. Post bellum Punicum tertium castigatus Senatus Carthaginiensis, quod contra fœdus exercitum et navalem materiam haberet. Testis Livius *Epit.* Lib. XLVIII. et XLIX. Simile est quod Sultanus Ægypti, pacto cum Græcis facto, impetravit, ut eisemel anno duas naves trans Bosphorum mittereliceret. Est id apud Gregoram libro IV. Antiochi olim pax et hoc continebat, ne is armatas naves haberet plures XII. Appianus *Syriaco.* (pag. 112. *Ed. Steph.*) Naves armatæ Adriaticum sinum ingredi per Venetos vetantur ex pactis. Vide Thuanum libro LXXX. in anno CIO IO LXXXIV.

° Reposul Lissum, pro *Lessum*, quod habent omnes Editiones. Nulla est urbs *Lessus*: et ἔξω τοῦ Λισσοῦ ait POLYBIUS, *Hist.* Lib. II. cap. 12. unde has fœderis leges sumsit Auctor noster, quamquam in ora libri solum Appia-

and after the battle of Salamis, within the Cyaneans and Phaselis. In the truce of the Peloponnesian war, it was agreed that the Lacedæmonians should not send to sea ships of war, but only merchant-ships of not above 500 talents burthen. In the First Treaty of the Romans with the Carthaginians, it was agreed that the Romans and their allies should not navigate beyond Cape Fair (*Pulchrum Promontorium*), except compelled by tempest or hostile force; and that those who had come under such compulsion should only take necessaries, and should depart within five days: and in the Second Treaty it was agreed that the Romans should not plunder nor traffic beyond Cape

Liv. xxxviii  
38.

tiocho, ne citra Calycadnum et Sarpedonem promontoria navigaret, extra naves quæ stipendium, legatos, aut obsides portarent.

L. Venditor.  
13. D. Comp.

2 Sed hæc non docent occupationem maris, aut juris navigandi. Possunt enim ut singuli, ita et populi pactis, non tantum de jure quod proprie sibi competit, sed et de eo quod cum omnibus hominibus commune habent, in gratiam ejus cujus id interest decedere: quod cum fit, dicendum est quod dixit Ulpianus in ea facti specie, qua fundus erat venditus hac lege, ne contra venditorem piscatio thynnaria exerceretur, mari servitutem imponi non potuisse, sed bonam fidem contractus exposcere, ut lex venditionis servetur. Itaque personarum possidentium et in jus eorum succedentium obligari.

Jul. Frontin.  
De Agror.  
Quaest. p. 38.

XVI. 1 Frequens est inter vicinos populos contentio, quoties flumen cursum mutavit, an simul et imperii terminus mutetur, et an quæ flumen adjecit, eis cedant quibus adjecta sunt: quæ controversiæ ex naturæ et modo acquisitionis definiendæ sunt. Docent nos mensores tria esse agrorum genera:

num indicet, qui paullum alio modo eas refert. Sic in præcedentibus edidi *Mastiam*, pro *Massiam*, quod perperam legitur in omnibus Editionibus. Ceterum de veteribus illis urbibus *Mastia* et *Tarseio*, quæ silentio prætermittit CELLARIUS in *Geographia Antiqua*, vide BOCHARTUM, *Phaleg*. Lib. III. cap. 7. J. B.

¶ *Mensura comprehensum*] Exem-

plum vide apud Servium ad eclogam IX. [Sed agitur ibi de *agris limitatis*. Vide ad vers. 7 et 28. J. B.]

¶ *Montes*] Tacitus de *Germania*: a *Sarmatis Dacisque mutuo metu aut montibus separatur*, c. 1. Plinius, libro XXXVI. *Evehimus ea que separandis gentibus pro terminis constituta erant, de Alpibus loquens*. [Locus est cap. 1. ubi suspicor pro *Evehimus*, legendum

Fair, Mastia, and Tarseium. In the peace with the Illyrians it was agreed that they should not navigate beyond Lissus with more than two barks, and those unarmed: in the peace with Antiochus, that he should not navigate beyond the promontories of Calycadnus and Sarpedon (in Cilicia), except with the ships which carried his subsidy, ambassadors, or hostages.

2 But these examples do not prove possession of the sea, or of the right of navigating, by occupation. For peoples as well as individuals may, by compact, concede to another not only the Rights which are theirs specially, but also those which they have in common with all men: and when this is done, we may say, what Ulpian said when an estate was sold on condition that the purchaser should not carry on a thunny fishery to the prejudice of the seller;—namely, that there could not be a servitude over the sea, but that the *bona fides* of the contract required that the rule of the sale should be observed; and

divisum, et assignatum, quem limitatum vocat Florentinus L. de Agric. Limitatis, 16. D. de Acq. Rer. Dom. jurisconsultus, quia manufactos limites pro finibus habet; assignatum per universitatem, sive <sup>1</sup>mensura comprehensum, puta per centurias ac jugera; et arcifinium, qui inde dictus, docente Varrone, quod fines habeat arcendis hostibus idoneos, id est naturales: ut sunt flumina et <sup>2</sup>montes. Hos occupatorios dicit Aggenus Urbicus, quia plerumque tales sunt agri, Apud. Front. ubi supra. p. 45. qui aut eo quod vacui sunt, aut etiam bello occupantur. In duobus primis agrorum generibus etiamsi flumen cursum mutet, nihil de territorio mutatur: et si quid alluvio adjecit, id occupantium imperio accedit.

2 In arcifiniis <sup>3</sup>flumen mutato paulatim cursu mutat et territorii fines, et quicquid flumen parti parti alteri adjecit, sub ejus imperio est, cui adjectum est: quia scilicet eo animo populus uterque imperium occupasse primitus creditur, <sup>4</sup>ut flumen sui medietate eos dirimeret, tanquam naturalis terminus. Tacitus dixit: *Certum jam alveo Rhenum, <sup>5</sup>quique terminus esse sufficiat.* Diodorus Siculus, ubi controversiam narrat, quae De Morib. Germ. 32. Lib. xii. 82. p. 328.

*Evellimus, quae vox aptissima ad terminos motos significandos. Et de evectioe in sequentibus agitur: Navesque marmorum causa fiunt ac per fluctus ... huc illucque portantur juga montium, etc. Tota series orationis mihi videtur favere huic facillimae emendationi. Peritiores judicent. J. B.]*

<sup>6</sup> *Flumen mutato paulatim cursu]* Vide Johannem Andrea et alios citatos a Reinkingio libro I. classe v. c. 1.

<sup>1</sup> *Ut flumen sui medietate eos dirimeret]* Exemplum in Vedaso amne apud Marianam libro xxix. (cap. 23.)

<sup>2</sup> *Quique terminus esse sufficiat]* Spartianus Adriano (cap. 12): *in plurimis locis, in quibus barbari non fluminibus, sed limitibus dividuntur.* Phasim annem *σύνορον*, id est, confinem vocat Constantinus Porphyrogenneta, c. 45.

therefore that the possessors and their successors were under a personal obligation to observe the condition.

XVI. 1 When a river changes its course, a question often arises between neighbouring peoples whether the boundary of the territory also changes, and whether the additions which the river makes to one side belong to the land to which they are added; which controversies are to be solved by regarding the nature and mode of the acquisition.

Those who write concerning land, tell us that there are three kinds, the *limitatus*, which is limited by an artificial boundary; the *assignatus per universitatem*, which is determined by its measured quantity, and the *arcifinius*, which is defined by natural boundaries, as rivers or mountains.\* In the two former kinds, if the river changes

\* Gronovius says that these distinctions are wrongly given by Grotius, and wrongly applied; but Barbeyrac defends him.

Lib. iv. *Exp. Cyri*, § 1.

inter Egestanos et Selinuntios fuit, ποταμοῦ, αἰτ, τὴν χάραρ ὀρίζοντος, *amne fines discriminante*. Et Xenophon talem amnem simpliciter τὸν ὀρίζοντα, id est, *finiorem*, vocat.

Strabo x. p. 458.

3 Narrant veteres Acheloum amnem, incerto cursu, modo sectum in partes, modo circumactum obliquo agmine, (unde tauri et serpentis formam induisse dicitur) diu de agro adjacente belli causam Ætolis et Acarnanibus præbuisse, donec eum Hercules aggeribus domuit eoque beneficio Oenei Ætolorum regis filiam in matrimonium impetravit.

L. *Proponebatur*, 76. D. *de Judic.*

XVII. 1 Sed hoc ita demum locum habebit, si non alveum mutaverit amnis. Nam flumen, etiam qua imperia disternit, non consideratur nude qua aqua est; sed qua aqua alveo tali fluens ripisque talibus inclusa. Quare particularum adjectio, decessio, aut talis immutatio, quæ toti speciem veterem relinquet, rem sinit eandem videri. At si totius species simul mutetur, res erit alia: atque ideo sicut interit flumen, quod in loco superiore molibus obstructum est, novumque nascitur facta manu fossa, in quam aqua immittitur: ita \*si deserto alveo veteri alia irruerit flumen, non idem

\* *Si deserto alveo veteri*] Ut Bardarus amnis apud Annam Comnenam, libro 1. (cap. 5.)

its course, the territory is not changed, and if any alluvial addition is made to it, it is an accession to the property of the occupier of the land.

2 In land defined by a river, its natural boundary, if the river changes its course gradually, it changes also the boundary of the territory; and whatever the river adds to one side belongs to him to whose land it is added; because each people must be supposed to have settled their claims on the understanding that the river, as a natural terminus, should divide them by a line drawn along its middle. So Tacitus speaks of the Rhine as a boundary, so Diodorus of another river; and Xenophon calls such a river simply the *Horizont*, the boundary.

3 The ancients relate that the Achelous, perpetually changing its course, was the constant cause of war between the Etolians and Acarnanians; and that Hercules confined it within banks, and thus put an end to the quarrel.

XVII. 1 But this is only true if the river has not *at once* changed its channel. For a river, as bounding territories, is not considered simply as water, but as water flowing in a certain channel and bounded by certain banks. And therefore any addition or subtraction of particles which leaves to the whole the same general aspect, allows the thing to be taken for the same. But if the aspect of the whole be

erit quod fuit ante, sed novum vetere extincto: et sicut si exaruisset flumen, imperii terminus maneret medietas alvei, qui proxime fuisset: quia mens ea populorum fuisse censenda est, ut flumine quidem naturaliter dirimi vellent: quod si flumen esse desiisset, ut tum teneret quisque quod tenuisset: ita mutato alveo idem observandum erit.

L. 3. § 2. ff.  
de Ac. Quot.  
et Actioe.

2 In dubio autem imperia, quæ ad flumen pertingunt, arcifinia putanda sunt, quia imperiis distinguendis nihil est aptius quam id quod non facile transitur. Ut autem limitata, aut mensura comprehensa sint, rarius accidit; neque tam ex acquisitione primæva, quam ex aliena concessione.

XVIII. Quanquam vero in dubio, ut diximus, imperia ad medietatem fluminis utrinque pertingunt, fieri tamen potuit, et contigisse alicubi videmus, ut flumen totum parti uni accederet, quia scilicet ripæ alterius imperium serius occupato jam flumine cœpisset: aut quia eum in modum res pactionibus esset definita.

changed at once, it becomes another thing. If a river is dammed up in the upper part, and turned into a new cut made by hand, it ceases to be that river; and in like manner if the river leave its old bed and break its way by a new channel, it is not the same river as before, but a new river, the old one being extinguished. And since, if the river had dried up, the boundary of the territory would remain the middle of the channel as it was just before; so, because the intention of the peoples must be supposed to have been that their lands were to be naturally divided by the river, but that if the river ceased to be, then each should hold what he had held; therefore when the channel is thus changed the same rule must be observed.

2 In doubtful cases, the territories which border on the river are to be supposed to have that for their boundary: because nothing is more suitable for separating the lands of different nations than a river which is not easily crossed.

That national territories are defined by the rules of *ager limitatus*\* or *ager mensura comprehensus* more rarely happens; and then, not from primeval occupation, but from concession, [or by treaty.]

XVIII. But though in doubtful cases, as we have said, national territory extends to the middle of the river, it may happen, and sometimes does, that the whole of the river belongs to one party; as when the second bank has been taken possession of at a later period, after the first bank and the river had been already occupied; or because the matter was so settled by compact.

\* In modern times, national territories have frequently been defined by boundaries entirely artificial, as parallels of latitude, and meridians; of which the map of America affords many examples. W. W.



XIX. 1 Illud quoque observatu non indignum, originariam acquisitionem censendam etiam rerum earum, quæ dominum habuerunt, sed habere desierunt: puta quia derelictæ sunt, aut quia defecerunt domini: nam hæc redierunt in eum statum, in quo primum res fuerant.

2 Sed illud simul notandum est, interdum primas acquisitiones a populo aut populi capite ita factas, ut non tantum imperium, in quo inest jus illud eminens, de quo alibi egimus, sed et privatum plenumque dominium generaliter primum populo, aut ejus capiti quæreretur: atque ut deinde particulatim in privatos ita fieret distributio, ut tamen eorum dominium ab illo priore dominio penderet, si non ut jus vasalli a jure senioris, aut jus emphyteuticarii a jure proprietarii, tamen alio quodam tenuiore modo, ut multæ sunt species juris in rem, quas inter est et jus ejus, qui sub conditione fideicommissum exspectat. Seneca: *Non est argumentum, ideo aliquid tuum non esse, quia vendere non potes, quia consumere, quia mutare in deterius aut melius non potes. Tuum enim est etiam quod sub certa lege tuum est.* Dion Prusæensis Rhodiaca:

p. 325 D.

<sup>7</sup> *Non est argumentum*] Locus est de *Beneficiis* VII. 12. Idem libro ejusdem argumenti octavo, c. 12, *quædam quorundam sub certa conditione sunt.* [At vero sunt tantum septem Libri de *Beneficiis*. Locus est eodem libro et capite, quo ille, cujus verba in textu adferuntur. *J. B.*]

<sup>9</sup> Locum forte inveni lib. XII. ubi agitur de ministris sacrorum, quorum Archelaus Pontifex, Rex Comanæ a Pompeio constitutus, dominus erat, ita

tamen ut eos vendere non posset: Καὶ τῶν τῆν πόλιν οἰκούντων ἱεροδούλων κύριος πλὴν τοῦ πικράσκευ. Pag. 558. *Ed. Casaub. Paris. J. B.*

<sup>2</sup> *Ad universitatem aut ad dominum superiorem redit*] Sic ex libro secundo *Odysseæ* in fine colligas, bona ejus qui sine liberis decederet ad populum pervenisse, et sic interpretatur Eustathius illud *Homeri Iliados E. (vers. 168)*:

Χηρωσταὶ δὲ διὰ κτήσων δατέοντο.  
Partiebantur opes rectores urbis.

XIX. 1 This also is worth observing; that there may be an original acquisition of those things which have had an owner, but have ceased to have one; as being derelict, or because the owners have been removed; for then things return into the state of nature in which they were at first.

2 This also is to be noted; that sometimes the first acquisitions of property are made by a people or its head in such a manner that not only the lordship, including that *jus eminens* of which we have spoken, (B. I. c. iii. § vi;) but that also the private ownership, was acquired at first generally for the people or its head; and then the property was distributed particularly in special lots to private persons, in such a manner that their ownership depended on that former ownership; if

μυρίους γὰρ εὐρήσετε τρόπους καθ' οὓς ἐκάστου τι φαιμέν  
εἶναι· καὶ πλείστον διαφέρονται ὧν οὔτε ἀποδόσθαι τι  
ἔξῃστι τοῖς ἔχουσιν, οὔτε ὅπως ἂν θέλοι χρῆσθαι. *Plurimi  
sunt modi, quibus quid cujusque esse dicitur, et quidem  
valde inter se differentes: interdum ut nec vendere, nec pro  
arbitrio uti liceat. Apud Strabonem invenio: κύριος ἦν  
πλὴν τοῦ πιπράσκειν dominus erat demto vendendi jure.*  
Exemplum ejus quod diximus in Germanis ponit Tacitus: *De Morib.  
German. 36.*  
*Agri pro numero cultorum ab universis occupantur, quos  
mos inter se secundum dignationem partiuntur.*

3 Hoc igitur modo cum distributa dominia pendent a do-  
minio generali, si quid domino particulari carere incipit, non  
fit occupantis, sed <sup>2</sup>ad universitatem, aut ad dominum superi-  
orem redit. Cui juri jus simile etiam per legem civilem extra  
hanc causam, ut jam notare cœpimus, introduci potuit.

Nam *χρησταις* magistratum fuisse  
dicit qui bona sine liberis decedentium  
administrabat. Simile aliquid usurpa-  
tum olim in regno Mexicano docent nos  
historiæ. [In loco ex *Odyssea* Poeta  
hoc tantum innuit, inter Procos Penelo-  
pæ convenisse, si forte Telemachus in-  
terisset, sese bona ejus sequi partibus  
occupaturos, ut solatii loco id esset illis,  
quos Penelope, uno electo in virum, ex-  
clusura esset; ut optime observavit

Doctissima Matrōna Anna T. Fabri.  
Adeoque inde quod auctor noster col-  
ligit, minime inferri potest. Neque  
certius est, quod de *χρησταις*, post  
Eustathium, adfirmat. Vocem enim  
illam interpretantur Pollux et Hesychius  
non de magistratibus, bona sine liberis  
decedentium administrantibus, sed de  
propinquis remotis in hereditatem suc-  
cedentibus. *J. B.*]

not in the same way as the ownership of a Vassal from that of Seigneur, or the ownership of the tenant-farmer from that of the landlord, yet in some slighter way; as in fact there are many species of ownership: among which is the ownership of a trustee. So Seneca and Dio Prusæensis, Strabo, Tacitus, speak of various ways in which a thing may be mine. [See.]

3 And since private properties thus depend on the general proprietorship, if any portion of property ceases to have a special owner, it does not then become the property of the occupier, but reverts to the community, or to the superior lord. And a rule similar to this of Natural Law, might be introduced by Civil Law, without the reason we have given.

## CAPUT IV.

### DE DERELICTIONE PRÆSUMTA, ET EAM SECUTA OCCUPATIONE, ET QUID AB USUCAPIONE ET PRÆSCRIPTIONE DIFFERAT.

- I. *Usucapio aut præscriptio proprie dicta cur locum non habeat inter populos diversos, eorumve rectores.*
- II. *Solere tamen et inter hos allegari longævæ possessiones.*
- III. *Causa inquiritur ex conjecturis humanæ voluntatis: quæ petuntur non ex verbis tantum:*
- IV. *Sed et ex factis:*
- V. *Et ex non factis.*
- VI. *Quomodo tempus adjunctum non possessioni et silentio ad conjecturam juris derelicti valeat.*
- VII. *Ordinarius ad talem conjecturam sufficere tempus memoriam excedens, et quale hoc sit.*
- VIII. *Solutio objectionis, neminem præsumendum suum jactare.*
- IX. *Videri etiam, seposita conjectura, jure gentium ex immemoriali possessione dominium transferri.*
- X. *An nondum natis jus auferri hoc modo possit.*
- XI. *Etiam summæ potestatis jus aut populo aut regi acquiri longævæ possessione.*
- XII. *An leges civiles de usucapione et præscriptione teneant eum, qui summam potestatem habet, cum distinctionibus explicatur.*
- XIII. *Ea jura, quæ separabiliter aut communicabiliter adherent summo imperio, usucapione aut præscriptione quæri et amitti.*
- XIV. *Refellitur sententia, statuens semper subditis licere se vindicare in libertatem.*
- XV. *Quæ mercæ sunt facultatis nullo tempore amitti: quod explicatur.*

I. **G**RAVIS hic difficultas oritur de usucapiendi jure. Namque id jus cum lege civili sit introductum (tempus enim ex suaapte natura vim nullam effectricem habet: nihil enim fit a tempore, quamquam non fit in tempore) locum habere non

---

CHAPTER IV. *Of presumed Dereliction of Property, and the Occupation which follows; and how it differs from Usucaption and Prescription.*

I. Here arises a great difficulty concerning the right of usucaption, [by which a thing long used becomes the property of the possessor.] This Right is introduced by the Civil Law, [not by Natural Law,] for time, of its own nature, has no effective power; for nothing is done by

potest, ut censet Vasquius, inter duos populos liberos, aut reges, populumve liberum et regem: imo ne inter regem quidem et privatum ipsi non subditum, <sup>a</sup>nec inter duos diversorum regum aut populorum subditos: quod verum videtur, nisi quatenus res vel actus tenetur territorii legibus. Atque id si admittimus, sequi videtur maximum incommodum, ut controversiæ de regnis regnorumque finibus nullo unquam tempore extinguantur: quod non tantum ad perturbandos multorum animos et bella serenda pertinet, sed et communi gentium sensui repugnat.

II. Nam et in sacris literis Jephthes regi Ammonitarum sibi vendicanti terras inter Arnonem et Jabocum, et ab Arabum desertis ad Jordanem sitas, objicit trecentorum annorum possessionem, et ab eo quærit, cur ipse ejusque majores tanto tempore cessaverint? Et Lacones apud Isocratem, tanquam certissimum <sup>b</sup>et apud omnes gentes confessum ponunt, posses-

Lib. II. 51.  
n. 28.

Judic. xi. 26.

Archid. p.  
131 A.

<sup>a</sup> Nec inter duos diversorum regum aut populorum subditos] In lege XII. tabularum erat: *Æterna auctoritas cum hoste esto*, id est, cum peregrino. [Apud CICERON. *De Offic.* lib. I. cap. 12.]

<sup>b</sup> Et apud omnes gentes confessum] In hunc sensum disserit pro Gallia dux Nivernensis apud Thuanum libro LIX. in anno CLO IO LXXIV.

time, though everything is done in time. Hence this right, as Vasquius thinks, cannot have place between two free peoples, or kings, or a people and a king; nor even between a king and a private person who is not his subject, nor between the subjects of two different kings or peoples: which appears to be true, except so far as things and acts are governed by the laws of the territory: [for a person in one territory, knowing the laws of another territory as to usucaption, may act accordingly, in questions of right between him and another person in the stranger territory.] Yet if we admit this, there seems to follow this very inconvenient conclusion, that controversies concerning kingdoms and their boundaries are not extinguished by any lapse of time; which not only tends to disturb the minds of many and to perpetuate wars, but is also repugnant to the common sense of mankind.

II. For [the authority of time and usage has been generally acknowledged in disputes on such subjects]. So in Judges xi. 13, 26, when the king of the Ammonites claimed the land from Arnon to Jabbok and Jordan, Joshua said that Israel had dwelt there 300 years; *why therefore did ye not recover them in that time?* And the Lacedæmonians in Isocrates lay it down as a rule most certain, and acknowledged by all nations, that public possessions, as well as private, are so confirmed by length of time that they cannot be taken away; on this ground they

siones publicas, non minus quam privatas, multo tempore ita firmari, ut revelli nequeant: quo jure repellunt eos, qui Messenam repetebant. Verba Græca sunt: τὰς κτήσεις καὶ τὰς ἰδίας καὶ τὰς κοινὰς, ἣν ἐπιγένηται πολὺς χρόνος, κυρίας καὶ πατρῷας ἅπαντες εἶναι νομίζουσι. Idem <sup>1</sup>Isocrates ad Philippum: κάτοχον καὶ βέβαιον τὴν κτῆσιν πεποιήκωτος τοῦ χρόνου. *Cum firmam stabilemque possessionem longa dies*

Liv. xxxii. 10.

*reddidisset.* Hoc jure nisus posterior Philippus T. Quintio dicebat, *civitates quas ipse cepisset se liberaturum: quæ sibi traditæ a majoribus essent justa ac hæreditaria possessione,*

Liv. xxxv. 16.

*se non excessurum.* Sulpitius contra Antiochum disputans ostendit iniquum esse, ut quod populi Græci in Asia aliquando serviissent, id jus post aliquot sæcula eos asserendi in servitutum faciat. Et historici <sup>c</sup>vetera repossere vaniloquentiam

Tacit. Ann. vi. 31.

vocant: μυθικὰς καὶ παλαιὰς ἀποδείξεις Diodorus. Apud Ciceronem est *de Officiis* secundo: <sup>d</sup>*Quam autem habet æquitatem, ut agrum multis annis aut etiam sæculis ante possessum, qui nullum habuit, habeat, qui autem habuit, amittat?*

Cap. 22.

III. Quid dicemus? Juris effectus qui ab animo pendet, non possunt tamen ad solum animi actum consequi, nisi

<sup>1</sup> Verba illa non sunt Isocratis, sed Dionysii Halicarnass. in *Judicio de Isocrate*, ubi exhibet summam Orationis ipsius Archidami, ex qua locus præcedens. Cap. ix. pag. 155. Tom. II. *Ed. Oron. J. B.*

<sup>c</sup> *Vetera repossere*] Τὰ πρὸ Εὐκλείδου

dicunt Græci ex historia Attica: usus inter alios Nicetas, Lib. I. (cap. 9) de Alexio Isaaci fratre, ubi de Henrico agit Imperatore Friderici filio: καὶ ταῦτα δὴ τὰ πρὸ Εὐκλείδου ἀνυποστόλας ἀνακινῶν ita ille velut ante Euclidem gesta movebat inverecunde. [Vide Lu-

repe those who demand Messena. [See.] So Philip the Second of Macedon told Quintius that he would give up the cities which he had himself taken, but not those which had legitimately descended to him from his ancestors. Sulpitius in Livy, disputing against Antiochus, shews it to be unjust that because the Greeks in Asia had at one time been in subjection, he should make that the ground of an asserted right of reducing them to subjection again after several ages. The historians speak of the claim of ancient possessions as idle talk, mythical stories. See also Cicero.

III. In truth, the effects, as to Rights, which depend on man's will, still do not follow the mere internal act of the mind, except that act be indicated by some external signs. For to assign a jural efficiency to mere acts of the mind, would not be congruous to human nature, which cannot know the acts of the mind, except from outward signs. Yet signs denoting the acts of the mind have never a mathematical, but

is actus signis quibusdam indicatus sit: quia nudis animi actibus efficientiam juris tribuere non fuerat congruum naturæ humanæ, quæ nisi ex signis animi actus cognoscere non potest: qua de causa etiam interni actus meri legibus humanis non subjacent. Signa autem nulla de animi actibus certitudinem habent mathematicam, sed probabilem tantum: nam et verbis eloqui aliud possunt homines, quam quod volunt et sentiunt, et factis simulare. Neque tamen patitur natura humanæ societatis, ut actibus animi sufficienter indicatis nulla sit efficacia: ideo quod sufficienter indicatum est, pro vero habetur adversus eum qui indicavit. Ac de verbis quidem expedita res.

IV. 1 Factis intelligitur derelictum, quod abjicitur, nisi ea sit rei circumstantia, ut temporis causa et requirendi animo abjectum censi debeat. Sic chirographi redditione censetur remissum debitum. Recusari hereditas, inquit Paulus, non tantum verbis, sed etiam re potest, et quovis indicio voluntatis. Sic si is, qui rei alicujus est dominus, sciens cum altero eam rem possidente, tanquam cum domino contrahat, jus suum remisisse merito habebitur: quod cur non et inter reges locum habeat, et populos liberos nihil causæ est.

L. 9. § ult.  
D. de Acq.  
Rer. Dom.  
L. 8. D. ad  
Leg. Rhod.  
l. 43. § 11. D.  
de Furtiv.  
L. 2. § 1. ff.  
de Pactis.  
L. 96. D. de  
Acq. vel  
Omitt. Hered.

CIANUM, in *Cataplo*, T. I. *Ed. Amst.* p. 426. et *Hermotim.* p. 563. Locus autem Diodori Siculi, qui postea sine ullo indicio adfertur, exstat Lib. xv. cap. 78. pag. 497. *Ed. H. Steph.* Et pag. seq. dicitur *βίη καὶ ἀδίκως* ejusmodi possessio haberi. *J. B.*]

<sup>d</sup> *Quam autem habet æquitatem, ut agrum multis annis aut etiam sæculis ante possessum, qui habuit, amittat?* Florus, Lib. III. c. 13. *Tamen relictas a majoribus sedes, ætate, quasi jure hæreditario possidebant.*

only a probable certainty; for men may express in words something different from what they feel and will, and may simulate in their acts. But the nature of human society does not suffer that the acts of the mind, sufficiently indicated, should have no efficacy: therefore what is sufficiently indicated in words, is to be held true, as against him who so indicates it.

This doctrine of the force of words is to be applied to derelicts.

IV. 1 A derelict may also be indicated by the fact; thus, that is a derelict which is thrown away; unless the circumstances of the case be such that it may be supposed to be put away for a time and with the intention of taking it again. Thus a debt is supposed to be remitted by giving up the note of hand which acknowledges it. An inheritance, as Paulus says, may be refused, not only by words, but by deed, and by any indication of will. So if he who is the owner of anything, knowingly contracts with another person in whose possession it is, as

2 Simile est quod superior concedens inferiori, vel imperans id facere quod facere licite non potest, nisi lege solvatur, lege solvisse eum intelligitur. Venit enim hoc non ex jure civili, sed ex jure naturali, quo quisque suum potest abdicare, et ex naturali præsumptione, qua voluisse quis creditur quod sufficienter significavit: quo sensu recte accipi potest quod Ulpianus dixit, juris gentium esse acceptilationem.

L. 57. D. de  
re Jud. et  
l. 3. ff. de  
off. Prætor.

L. 8. D. de  
Acceptil.

V. 1 Sub factis autem moraliter veniunt et non facta, considerata cum debitis circumstantiis. Sic qui sciens et præsens tacet, videtur consentire: quod et lex Hebræa agnoscit, Numer. xxx. 4, 5, 11, 12, nisi circumstantiæ ostendant, quominus loquatur, metu eum vel alio casu impediri. Sic amissum censetur id <sup>e</sup> cujus recuperandi spes projicitur, ut porcos a lupo raptos, et quæ naufragio amittimus, nostra esse desinere ait Ulpianus, non statim, sed ubi recipi non possunt, id est, ubi non est cur credatur aliquis animum domini retinere: ubi nulla talis voluntatis indicia exstant. Nam si missi essent qui rem inquirerent, si promissum *μῆνυτρον*, aliud esset judican-

L. 44. D. de  
Acq. Rer.  
Dom.

<sup>e</sup> *Cujus recuperandi spes projicitur*] Id *ἔννε* dicitur Hebræis jurisconsultis.

with the owner, he must be held to lose his right: and there is no reason why this should not hold also between kings and peoples.

2 In like manner a superior, making a concession to an inferior, or giving him a command which he cannot lawfully perform, except he be relieved from the tie of the law, is supposed to have loosed that tie. This rule flows, not only from the Civil Law, but from Natural Law, according to which any one may abdicate what is his; and from the natural presumption by which every one is supposed to intend what he has sufficiently indicated. And in this sense may be accepted what Ulpian said, that the acknowledgment in court of the payment of a debt\*, is a part of *jus gentium*; (it being really a part of *jus civile*).

V. 1 Among "facts" we must also understand what is left undone, considered with due circumstances. If any one, present and knowing, is silent, he may be assumed to assent; as also the Hebrew Law recognizes, Num. xxx. 4, 5, 11, 12: *If a woman vow a vow, &c.*; except circumstances shew that he was prevented from speaking by fear or other cause. Thus that is supposed to be lost, with regard to which the hope of recovering it is given up; as Ulpian says, that pigs

\* Heinec. *Elem. Jur. Civ.* § 1022. Est ergo *acceptilatio* actus legitimus quo interrogatione debitoris et congrua creditoris responsione obligatio per stipulationem contracta dissolvitur. Formula erat *Quod ego tibi promisi, habes acceptum? Habeo acceptum.*

dum. Sic qui rem suam ab alio teneri scit, nec quicquam contradicit multo tempore, is nisi causa alia manifeste appareat, non videtur id alio fecisse animo, quam quod rem illam in suarum rerum numero esse nollet. Et hoc est quod alicubi dixit Ulpianus, ædes longo silentio videri pro derelicto a domino habitas. *Parum juste* (rescripsit Pius Imperator) *præteritas usuras petis, quas omisisse te longi temporis intervallum indicat: quia eas a debitore tuo, ut gratior apud eum videlicet esses, petendas non putasti.*

L. 15. § 21.  
D. de Damno  
Infect.  
Lib. xvii. § 1.  
D. de Usuris.

2 Cui simillimum quid in consuetudine apparet. Nam hæc quoque, semotis legibus civilibus, quæ certo tempore ac modo eam introduci volunt, a populo subdito introduci potest ex eo quod ab imperio habente toleratur: tempus vero, quo illa consuetudo effectum juris accipit, non est definitum, sed arbitrarium, quantum satis est ut concurrat ad significandum consensum.

Thom. 1. 2. q.  
17. art. 3.  
Suar. Lib.  
vii. de Leg.  
c. 15.

3 Sed ut ad derelictionem præsumendam valeat silentium duo requiruntur, ut silentium sit scientis, et ut sit libere volen-

---

carried off by wolves, and goods lost in shipwreck, cease to be ours, not at once, but when they cannot be recovered; that is, when there is no reason to believe that they keep any hold on the mind of the owner; when there is no indication of a purpose of recovering. For if persons have been sent to seek what is lost, or if a reward for finding it is offered, we must judge differently. If any one knows a thing which is his to be held by another, and in the course of a long time says nothing against it, he, except some other reason manifestly appear, must be supposed to have acted with the purpose of no longer having that thing as his. And so Ulpian says, that a house may, by long silence, be understood to be derelict by the owner. And Pius, the Emperor, in a rescript says, You have no right to ask for the interest of your money for the past period, for the length of time shews that you had given it up. You did not require this payment from your debtor, in order to gain favour with him.

2 Similar to this is the case of Custom. For Custom, without referring to the Civil Law, which fixes a certain time and manner for introducing it, may be introduced by a subject people, in virtue of its being tolerated by the Ruler. But the time in which such Custom receives the effect of Law, is not defined, but arbitrary; namely, as much as is necessary to signify the consent of the party.

3 But in order that silence may be valid for the presumption of derelict, two things are required; that it be the silence of a party knowing, and freely willing; for the inaction of a party which is in



tis: nam <sup>1</sup>non agere nescientis, caret effectu; et alia causa cum apparet, cessat conjectura voluntatis.

VI. Ut hæc igitur duo adfuisse censeantur, <sup>2</sup>valent et aliæ conjecturæ: sed temporis in utrumque magna vis est. Nam primum fieri vix potest, ut multo tempore res ad aliquem pertinens non aliqua via ad ejus notitiam perveniat, cum multas ejus occasiones subministret tempus. Inter præsentés tamen minus temporis spatium ad hanc conjecturam sufficit, quam inter absentes, etiam seposita lege civili. Sic et incussus semel metus durare quidem nonnihil creditur, sed non perpetuo, cum tempus longum multas occasiones adversus metum sibi consulendi, per se, vel per alios suppetit, etiam exeundo fines ejus qui metuitur, saltem ut protestatio de jure fiat, aut, quod potius est, ad iudices aut arbitros provocetur.

*L. Hoc Jure, § ductus, 4. D. de Aqua Quot. et Est.*

VII. Quia vero <sup>3</sup>tempus memoriam excedens quasi infinitum est moraliter, ideo ejus temporis silentium ad rei dere-

<sup>1</sup> *Non agere nescientis, caret effectu]* Vide infra hoc libro, cap. xxi. § 11. Adde si vacat *Bart. Soc. consilio CLXXXVII.* col. 8. Meischnerum decisione Camerali ix. n. 113. Tom. III.

<sup>2</sup> Non tam ex derelictione tacita, cujus præsumtio satis firma ut plurimum non adest, quam ex jure Possessoris bonæ fidei et ipso fine Dominii constituti, fundamentum juris istius deducendum esse, ostendimus ad PUFENDORFIUM nostrum, *De Jure Nat. et Gent.*

in Notis alteri Editioni adjectis, Lib. IV. cap. xii. § 8. Totum illud Caput in hanc rem conferri potest. *J. B.*

<sup>3</sup> *Tempus memoriam excedens]* Andreas Knich in tractatu de jure territorii. Reinking. Lib. I. classe 5. cap. ii. n. 5. Oldendorp. classe iii. art. 2.

<sup>b</sup> *Nisi validissime sint in contrarium rationes]* Menochius I. cons. xc.

<sup>1</sup> *Non plane idem esse]* Balbus de præscriptionibus id notavit, et in eodem argumento Covarruvias. Reinking dic-

ignorance, has no effect; and when there is another cause known which influences the will, conjecture as to what it is ceases.

VI. To establish the assumption of these two conditions, other conjectures are of force: but for the most part, the effect of time, in both points, is great. For in the first place, it can hardly happen that in a long time, a thing pertaining to any one should not come to his knowledge, since time supplies many occasions. And a shorter time is sufficient for this purpose in a case between persons present, than absent, even without referring to the Civil Law. So fear once impressed is understood to last for a certain time, but not for ever, since a long time affords many occasions of taking counsel against the danger, either by one's own means or by means of others; as by going out of the bounds of the authority of him who inspires the fear; or at least, it affords the means of renewing our right by protest, or,

lietæ conjecturam semper sufficere videbitur, <sup>b</sup>nisi validissimæ sint in contrarium rationes. Bene autem notatum est a prudentioribus jurisconsultis, <sup>i</sup>non plane idem esse tempus memoriam excedens cum centenariis, quanquam sæpe hæc non longe abeunt: quia <sup>k</sup>communis humanæ vitæ terminus sunt anni centum: quod spatium ferme solet ætates hominum, aut <sup>l</sup>*γενεάς* tres efficere: quas Antiocho Romani objiciebant, cum ostenderent repeti ab eo urbes, quas ipse, pater, avus nunquam usurpassent.

*Eustath. ad  
Iliad. l. v.  
280.*

*Liv. xxxiv. 68.*

VIII. 1 Objiciat aliquis, cum homines se suaque ament, non debere eos credi quod suum est jactare, ac proinde actus negativos, etiam cum magno temporis spatio, non sufficere ad eam quam diximus conjecturam. Sed cogitare rursus debemus bene sperandum de hominibus, ac propterea non putandum eos hoc esse animo, ut rei caducæ causa hominem alterum velint in perpetuo peccato versari, quod evitari sæpe non poterit sine tali derelictione.

to Lib. i. classe 6, c. ii. n. 40. de tempore memoriam excedente: vide eruditissimum Fabrum in consilio pro ducatu Montisferratensi.

<sup>k</sup> *Communis humanæ vitæ terminus*] *Αἰῶνες μάλλον ἢ περ χρόνον* dixit Justinianus in edicto quinto, edito in notis ad arcanam historiam Procopii.

<sup>l</sup> *Γενεάς τρεῖς*] Nam *γενεά* est *τριακονταετία*, triginta annorum ætas, ut Porphyrius notat in Homericis quæstio-

nibus. (pag. 99. *Edit. Barnes.*) tres *γενεάς* sæculum exponit Herodianus Severo. (Lib. III. cap. 8. *Ed. Bacl.*) in ccc. annis decem in Ægypto fuisse reges notat Philo in legatione. Lacedæmone annis quingentis reges quatuordecim, Plutarcho indicante in Lycurgo. (Pag. 58 A.) Justinianus in novella CLIX. vetat in judicia deduci causam, quod jam quatuor *γενεαί* exiissent. (cap. 2.)

what is better, of referring to judges or arbitrators.

VII. Since time beyond the memory of man is morally, as it were, infinite, a silence for such a time will always suffice to establish derelict, except there are very strong reasons on the other side. It is well remarked by the more prudent jurists, that time beyond the memory of man is not the same thing as a century, though the two periods are often not very different; because the common term of human life is a hundred years; which period commonly includes three generations of men; as the Romans objected to Antiochus, when they pointed out that he asked for cities which neither he, nor his father, nor his grandfather, had ever had.

VIII. 1 It may be objected that men are fond of their property, and that negative acts, even in a great length of time, ought not to be taken as proving that they throw it away. But, on the other hand, we ought to think well of men, and not to suppose that they would

Cicero, *pro  
Doto.* c. 13.

Lib. i. *De  
Rep.* p. 347 D.  
et Lib. vi. p.  
488.

Val. Max.  
iv. 1.

2 De imperiis vero, quamquam ea magni fieri solent, scire debemus magna esse onera, et quæ non bene administrata hominem divinæ iræ reddant obnoxium: ac sicut duram esset, qui se tutores dicorent, damno pupilli litigare uter ad tutelam jus habeat, aut, qua similitudine ad hanc rem Plato utitur, nautas navis periculo certare quis eorum potissimum gubernaret: ita non semper laudandos qui cum summa jac-tura, sæpe et cum sanguine innocentis populi disceptare cupiant, quis ejus populi rem sit curaturus. Laudatur ab anti-quis Antiochi dictum, qui populo Romano gratias egit, quod nimis magna procuracione liberatus modicis terminis uteretur. Inter multa a Lucano sapienter dicta illud non postremum est (Lib. II. vers. 60):

Tantone novorum

Proventu scelerum quærunt, uter imperet urbi?

Vix tanti fuerat civilia bella movere

Ut neuter.

3 Tum vero imperia tandem aliquando in certo et extra controversiæ aleam constitui, humanæ societatis interest;

<sup>m</sup> *Nimis magna procuracione libera-tus*] Ejus animi videtur fuisse Jonathan, Saulis filius. [1 *Sam.* xxiii. 17].

<sup>n</sup> *Aratus Sicyonius*] Sic et posses-siones, ut fuerant, reliquerat Thrasy-bulus, pace Athenis constituta. [At Thrasybulus, expulsus xxx. Tyrannis, tulit tantum legem *δημοκρατίας*. De pos-sessionibus, ut fuerant, relictis, nihil habent, nec XENOPHON, *Hist. Græc.* Lib. II. in fine; nec DIODORUS SICULUS,

Lib. XIV. cap. 34. nec ÆSCHINES, *Orat. de Falsa Leg.* pag. 271 A. nec JUSTINUS, v. 10, nec VALERIUS MAXIMUS, IV. 1. num. 4, externi qui rem narrant. Fal-lor an Auctor confudit cum hac pace, Athenis constituta, eam quæ inter Si-culos facta est, et qua cautum, referente Thucydide, ut singuli, quæ tum habe-rent in potestate, retinerent: "Ἐχοντες δὲ ἕκαστοι ἐχουσι. Lib. IV. c. 65. BON-GARSIVS id, tamquam exemplum simile,

allow another man to be perpetually in the wrong, for the sake of a perishable thing.

2 And as to political authority, though highly valued, it has also heavy burthens, and such as bring divine wrath on those who administer them ill: and as it would be cruel for different asserted guardians to litigate, at the expense of the ward, which has a right to manage his affairs; or, to use Plato's comparison, for the crew of a vessel to contend, with much danger to the vessel, who should steer; so are they not always to be praised who with great loss, and much effusion of the innocent people's blood, are ready to fight who shall govern the people. The ancients praise Antiochus for expressing his thanks to the Romans who had reduced his kingdom within manage-able limits. So Lucan implies that a rivalry for empire is absurd.

3 Then again, it is for the good of human society that govern-

quam quæ adjuvant conjecturæ, favorabiles putandæ sunt. Nam si durum putavit <sup>2</sup> Aratus Sicyonius privatas quinquaginta annorum possessiones labefactari, quanto magis illud Augusti tenendum est, eum virum bonum ac civem esse, qui præsentem reipublicæ statum mutari non vult, et qui, ut apud Thucydidem Alcibiades loquitur, ὅπερ ἰδέξατο σχῆμα τῆς πολιτείας τοῦτο ξυνδιασώζει: quod τὴν παροῦσαν πολιτείαν διαφυλάττειν dixit <sup>3</sup> Isocrates adversus Callimachum: sicut et Cicero oratione ad Quirites contra Rullum, otii et concordiæ patrono convenire ait, defendere statum reipublicæ qui quoque tempore sit: et Livius, optimum quemque præsentī statu gaudere.

[[Cic. Off. li. 23 c.]]  
[[Macrob Saturnal. Lib. i. c. 4. § 18 c.]]

Lib. vi. 79.

Lib. xxxv. 34.

4 Quod si etiam deficerent ea quæ jam diximus, tamen adversus præsumtionem, qua quisque sua servare velle creditur, validior est altera, quod credibile non est quemquam ejus quod vult, longo tempore °nullam plane edere significationem idoneam.

Ang. de Clavario in Summa, in Verb. Invent.

IX. Ac forte non improbabilius dici potest non esse hanc rem in sola præsumptione positam, sed <sup>p</sup>jure gentium

observaverat in nota ad laudatum Justinī locum: quod forte ansam dedit errori Auctoris nostri. J. B.]

<sup>3</sup> Est apud Oratorem τὴν παροῦσαν τύχην διαφυλάττειν, circa finem Orationis, pag. 383 E. Ed. H. Steph. J. B.

° Nullam plane edere significationem idoneam] Crantziius Saxoniorum xi. n. 10 et 13.

<sup>p</sup> Jure gentium voluntario inductam

hanc legem] Narrat Gregoras cum Cætanæ majoribus data esset ab Imperatoribus Græcis Phocææ, adjectam legem, ut singuli successores scriptam ederent professionem se eam tenere administratorum titulo, μη λάθῃ παρακρουσάμενη τὴν βασιλικὴν δεσποτείαν ἢ μεταξὺ τοῦ χρόνου μακρὰ περίοδοσ· ne inobservatus diuturni temporis lapsus jus imperatoris excluderet. [Lib. xi. circa init. Pag. 239. Ed. Genev. 1616.]

ments should at some time be placed beyond the risk and doubt of controversy; and the modes of settling the matter which have this tendency are to be preferred. If Aratus thought it hard that private possession of 50 years should be disturbed, we must still more hold by the saying of Augustus, that a good citizen does not wish the present state of the republic to be changed. So Alcibiades in Thucydides, Isocrates, Cicero, Livy.

4 And even if these arguments were wanting, the presumption that each man wishes to keep what he has, may be met by another presumption, that no man will stay a very long time without giving some indication what his wishes are.

IX. And perhaps we may say that this is not merely a matter of presumption, but that this law was introduced by an instituted law of nations, that a possession going beyond memory uninterrupted,

voluntario inductam hanc legem, ut possessio memoriam excedens, non interrupta, nec provocatione et arbitrum interpellata, omnino dominium transferret. Credibile est enim in id consensisse gentes, cum ad pacem communem id vel maxime interesset. Merito autem dixi possessionem non interruptam, id est, ut Sulpitius apud Livium loquitur, *uno et perpetuo tenore juris semper usurpato, nunquam intermisso*. Idem alibi dixit: *perpetuam possessionem, ac nullo ambigente*. Nam desultoria possessio nihil efficit, quomodo Numidæ excipiebant adversus Carthaginienses: *per opportunitates nunc illos, nunc reges Numidarum usurpasse jus, semperque penes eum possessionem fuisse, qui plus armis potuisset*.

Lib. xxv. 16.

Ibid. num. 9.

Apud Evand.  
xxiv. 62.

X. 1 Sed alia hic, et quidem perdifficilis, suboritur quæstio, an nondum natis jus suum tacite tali derelictione possit decedere. Si non posse dicimus, nihil ad tranquillitatem imperiorum ac dominiorum profecit modo data definitio, cum pleraque talia sint, ut posteris debeantur. Sin posse affirmamus, mirum videbitur quomodo nocere silentium possit his, qui loqui non potuerunt, quippe cum nec existerent; aut quomodo aliorum factum aliis damno esse possit.

2 Ad hujus nodi solutionem sciendum est, ejus qui non-

<sup>9</sup> *Neque dum existente eorum jure qui expectari possunt*] Multa sunt in historiis talium derelictionum exempla. Vide unum illustre in Ludovico IX.

Francorum rege, pro se liberisque abdicante jus, quod per Blancam matrem in Castellæ regnum habere poterat, apud Marianam libro XIII. c. 18.

not accompanied with any appeal to justice, absolutely transfers ownership. It is credible that nations have agreed upon this, since such a rule tends greatly to peace. But it is essential to require uninterrupted possession, as stated in Livy. For a desultory possession is of no efficacy, as the Numidians urge against the Carthaginians, also in Livy. [See.]

X. 1 But another and an important question arises here: whether those not yet born may tacitly lose their rights by such *dereliction*. If we say they cannot, the definition just given is of no avail for the tranquillity of authority and ownership, since most kinds of these are such that they belong to posterity. If we say that they can, it will appear strange how silence can prejudice those who cannot speak because they do not exist; and how the act of others can be allowed to harm them.

2 For the solution of this difficulty, it is to be observed, that he who is not yet born has no rights, as a thing not existing has no attributes. Wherefore if the people, from whose will the right of reigning pro-

dum natus est nullum esse jus, sicut nec ulla sunt accidentia rei non existentis. Quare si populus, a cujus voluntate jus regnandi proficiscitur, voluntatem mutet, iis qui nondum nati sunt, ut quibus jus quæsitum nondum est, nullam facit injuriam. Sicut autem populus expresse mutare voluntatem potest, ita et tacite credi mutasse. Mutata igitur populi voluntate, <sup>2</sup>neque dum existente eorum jure qui expectari possunt; parentibus autem e quibus nasci possunt, qui jus suo tempore essent habituri, id ipsum jus derelinquentibus, nihil est quod obstat quominus illud ut derelictum ab alio occupari possit.

3 Agimus de naturali jure: nam jure civili ut aliæ fictiones ita et hæc introduci potest, <sup>1</sup>ut eorum qui nondum sunt personam lex interim sustineat, atque ita impediatur ne quid adversum eos occupari possit: quod tamen leges velle non temere censendæ sunt, quia privata ista utilitas publicæ valde repugnat. Unde et illa feuda, quæ non ex jure proximi possessoris, sed ex vi investituræ primitivæ deferuntur, longo satis tempore acquiri posse receptior sententia est; quod ad jura majoratus, et ad res fideicommisso obnoxias non infirmis rationibus subnixus producit summi judicii jurisconsultus Covarruvias.

C. Possessor.  
p. 3. § 3.

<sup>1</sup> *Ut eorum qui nondum sunt personam lex interim sustineat*] *Ut lex civilis in hereditate jacente.* [L. 34. D. de acquir. rer. domin. L. 13. § 5. *Quod vi aut clam. &c.*]

ceeds, changes its will, it does no injury to those who are not yet born, and who have not yet acquired any right. And as the people may change its will expressly, it may also tacitly be presumed to have changed it. If then the will of the people be changed, and since the right of the expected progeny does not yet exist, and the parents from whom they are to be born relinquish their right, nothing prevents its being occupied by another as a derelict.

3 In this we speak of Natural Law: for by the Civil Law, as other fictions may be introduced, so this also, that the law may represent the part of the persons who do not yet exist, and may thus prevent adverse occupation being a prejudice to them: which purpose of the law, however, is not lightly to be assumed, because *that* private advantage is much at variance with public utility. Whence those fiefs which [by law] are conveyed, not by the right of the last possessor, but by a primitive investiture in each vacancy, may, by a sufficiently long usage, be acquired [as territory], as the best jurists hold. Covarruvias has asserted this with strong reasons, respecting rights of primogeniture and entailed estates.

*Spec. Tit. de Feud. § quoniam, vers. 3. Quæritur. Chass. de Cons. Burg. des mains-mortes. § 6. vers. par an et jour. n. 2. Crueset. de Ant. Temp. p. 4. § male-ria. n. 20.*

4 Nihil enim prohibet quominus lege civili jus tale introduci possit, quod uno actu alienari licite non possit; possit tamen ad vitandam dominiorum incertitudinem certi temporis neglectu amitti: atque ita etiam, ut exstituris salva sit actio personalis adversum eos qui neglexerunt, aut eorum heredes.

XI. Ex his quæ diximus apparet, et regi adversus regem, et populo libero adversus populum liberum jus acquiri posse, ut expresso consensu, ita derelictione, et eam secuta, aut ex ea vim novam capiente apprehensione. Nam quod dicitur, quæ ab initio non valent, ex post facto convalescere non posse, hanc habet exceptionem, nisi causa nova per se parere idonea intercesserit. Similiter et alicujus populi rex verus amittere poterit regnum et populo subjici; et qui revera non rex, sed princeps erat, rex summo cum imperio

\* *Res summo cum imperio fieri]*

Vide Vasquium controversiarum illustrium, Lib. i. c. xxiii. 3. Adde eundem Lib. ii. c. lxxxii. 8, 9. et sequentibus: vide et Panormitanum, Lib. i. cons. 82. et Peregrinum *De Jure Fisci*, vi. c. viii.

§ 10.

† *Nos aliter arbitramur]* Et Don Garzias Mastrill. *de Magistratu* Lib. iii. c. xi. 26: Joh. Oldendorpius consil. Marp. v. n. 47. volum. 1.

‡ *Qua scilicet pars est communitatis]*

4 For nothing prevents the Civil Law from introducing such a Right as cannot be alienated by one act, but yet, in order to avoid the uncertainty of ownership, may be lost by neglect after a certain time: but in such a way that future claimants shall retain a right of personal action against those who have committed the neglect, or their heirs.

XI. From what we have said, it appears that both a king as against a king, and a free people as against a free people, may acquire a right, not only by express consent, but by dereliction and possession following this, or taking a new force from it. For as to what is said, that what is not legally valid at first cannot become valid by the subsequent fact, it is to be taken with this exception, except a new cause intervene, fit of itself to produce such validity. And thus [by the course of usage] the king of any people may lose his authority and become subject to the people; and he who was not king, but only governor, may become king with absolute authority; and the sovereign authority, which at first was in the king or in the people wholly, may be shared between them.

XII. 1 This also is a question worth examining\*: Whether the

\* Gronovius treats this as the question whether any rights belonging to the sovereignty can be matter of prescription; and says that Grotius's opinion, that they cannot, is both servile, and dangerous to princes; for the power of princes has

fieri, et summum imperium quod penes populum, aut penes regem in solidum erat, inter eos dividi.

XII. 1 Illud etiam indagari operæ pretium est, an lex de usucapione aut præscriptione, condita ab eo qui habeat summum imperium, pertineat etiam ad ipsum jus imperii, et ejus partes necessarias, quas alibi explicavimus. Pertinere arbitrari videntur jurisconsulti non pauci, qui quæstiones de summo imperio ex jure tractant civili Romanorum. 'Nos aliter arbitratur: nam ut quis legibus obligetur, requiritur in legis auctore et potestas, et voluntas, saltem præsumta. Se per modum legis, id est, per modum superioris, obligare nemo potest: et hinc est quod legum auctores habent jus leges suas mutandi: Potest tamen quis obligari sua lege, non directe, sed per reflexionem, qua scilicet pars est communitatis ex æquitate naturali, quæ partes vult componi ad rationem inte-

Bart. in l. Hostes, D. de Capt. et in l. 1. D. de Ag. Plur. Arc. Jus. Cons. 70. Lib. iii. Aymon. de Antiq. p. 4. versic. materia isla. n. 73. Ant. Corsetus de Excell. Reg. q. 104. Balb. de Præc. 1. p. princ. et 2. part. q. 2. Castal. de Imp. quest. 83. et Covar. in c. Peccat. de Reg. Jur. in 6. p. 2. § 9. in fine.

Vide infra hoc libro, cap. xx. § 24. Seneca epistola LXXXV. *Duas personas habet gubernator: alteram communem cum omnibus qui eandem conscenderunt navem, qua ipse quoque vector est, alteram propriam qua gubernator est.* Trac-

tant hoc Claud. Seissellus de Rep. Gall. Lib. i. (cap. 12). Chassanæus de Gloria Mundi parte v. cons. 5. Gaillius Lib. ii. obs. LV. num. 7. Bodinus de Republica, Lib. i. c. viii. Reinking i. c. xii.

law of usucaption or prescription, made by the sovereign, may affect the right of sovereign authority, and its necessary parts, which we have elsewhere explained (B. i. c. iii. § vi.). Not a few of the Jurists seem to think that it may, treating this question of the sovereignty as a matter of Civil Law. We think otherwise. For in order that any one may be bound by a law, there is required both power and will, at least presumed, in the author of the law. But no one can bind himself in the manner of a law, that is, in the character of a superior: and hence it is that the authors of laws have the right of changing their laws. However, a person may be bound by his own law, not directly, but by reflexion; namely as being a part of the community, in virtue of natural equity, which requires the component parts to follow the analogy of the whole. So Saul put himself and his son

in many cases been increased by prescription; and where the power of the people rests upon prescription, if kings refuse to allow it, they are involved in seditions and troubles, like Charles I. in England.

But Barbeyrac remarks that Grotius is speaking of Usucaption and Præscription as defined according to the rules of Civil Law; and that he allows in Art. 2 of this section, that parts of the sovereignty may be established by usage, even in shorter times than the Civil Law requires for prescription. To which we may add, that Gronovius in another-note<sup>(61)</sup>, asserts that the people cannot be supposed to give up its "most just, certain and eternal possession of its sovereign rights; thus going much beyond Grotius on one side."



gri: quod a Saule in regni initiis observatum notat sacra historia, Sam. xiv. 40. Sed hoc hic locum non habet, quia legum auctorem hic consideramus, non ut partem, sed ut eum, in quo virtus insit integri: agimus enim de summo imperio qua tali. Sed nec voluntas adfuisse præsumitur: quia legum auctores non censentur se velle comprehendere, nisi ubi et materia, et ratio legis sunt universales, ut in æstimandis rerum pretiis. At summum imperium non est paris rationis cum rebus aliis: imo nobilitate sua res alias multum excedit. Neque ullam vidi legem civilem de præscriptione agentem, quæ summum imperium comprehenderet, aut comprehendere voluisse probabiliter censi posset.

2 Unde sequitur, neque tempus lege definitum sufficere ad acquirendum summum imperium aut partem ejus necessariam, si desint conjecturæ naturales, de quibus supra egimus: neque tantum temporis spatium requiri, si intra id tempus eæ conjecturæ quantum satis est adsint: neque legem civilem quæ acquiri certo tempore res vetat, ad res summi imperii pertinere. Posset tamen in ipsa imperii delatione populus

<sup>4</sup> Verius est, non posse a subdito plene acquiri longi temporis possessione ullum jus, quod ad summum imperium

pertinet. Dicemus in Notis Gallicis ad hunc locum. Vide interim Dissertationem Clarissimi et Celeberrimi J.Cti

Jonathan on the same footing as the rest of the people, 1 Sam. xiv. 40. But this does not apply in the case which we are now treating; for we consider the author of the law, not as a part of the community, but as him in whom the whole legislative virtue resides; for we speak of the sovereignty as such. [Therefore the sovereign has not the power of binding himself by such laws.] But neither can he be presumed to have the will; for the authors of laws are not supposed to include themselves, except both the matter and the reason of the law are universal; as in settling prices by law. But the sovereignty has not parity of reason with other things; on the contrary, it is a matter of a higher order than other things.

Nor have I ever seen a civil law treating of prescription, which comprehended in its sphere the sovereign power, or could be probably supposed to have comprehended it.

2 Whence it follows that the time defined by law is not sufficient to acquire the sovereignty or any necessary part of it, if there are wanting those natural conjectures of which we have before spoken; and that if those conjectures exist to a satisfactory extent, so great a space of time is not required; and that the Civil Law, which prohibits a possession being acquired in a certain time [by prescription], does not apply to the Sovereignty.

suam exprimere voluntatem; quo modo ac tempore amitti imperium non utendo posset: quæ voluntas sequenda haud dubie esset: nec infringi posset a rege etiam summum imperium obtinente: quia non ad imperium ipsum, sed ad ejus habendi modum pertineret: quo de discrimine alibi diximus.

XIII. Ea vero, quæ de summi imperii natura non sunt, nec ut proprietates naturales ad eam pertinent, sed aut separari ab ea naturaliter possunt, aut saltem cum aliis communicari, omnino subjacent legibus populi cujusque civilibus, quæ de usucapione et præscriptione factæ sunt. <sup>Covar. c. Poes. part. 2. § 2. n. 12, 13.</sup> Sic subditos esse videmus, qui præscriptione acquisierunt, ut appellari ab iis non possit: ita tamen ut semper aliqua ab eis sit provocatio, per supplicationem scilicet, vel alium modum. Nam ut ab aliquo nulla ratione possit provocari, cum persona subditi pugnat, ac proinde ad summum imperium aut partem ejus pertinet, nec potest aliter acquiri quam secundum jus naturale, cui summa imperia subjacent.

XIV. 1 Ex his apparet, quatenus recipi possit quod aiunt nonnulli, semper licere subditis si possint in libertatem,

Hallensis, CHRISTIANI THOMASII, De <i>Præscriptione Regalium ad jura Subditorum non pertinente</i> , ann. 1696. Halæ	Saxonum editam. J. B. * <i>Quod aiunt nonnulli</i> ] Ut Vasquius dicto libro II. c. lxxxii. n. 3.
---	---

It would however be possible that the people, in conferring the sovereignty, should express its will in what way and in what time the supreme authority might be lost by disuse; which will would undoubtedly be to be followed, and could not be infringed, even by a king possessed of the sovereign power; because it pertains, not to the sovereignty itself, but to the mode of holding it; of which difference we have elsewhere spoken.

XIII. But [though the sovereignty is thus exempt from the Rules of the Civil Law] those things which are not of the nature of the sovereignty, and do not belong to it as natural properties, but can either be naturally separated from it, or communicated to others, are altogether subject to the rules of Civil Law concerning Usucaption and Prescription. So we see that there are subjects who have by prescription acquired the Right that there is no appeal from them; but yet so that there is always some mode of carrying the matter to a higher tribunal, by petition, or in some other way. For that there should not be in any way an appeal from a person, is at variance with the notion of a subject: it belongs to a sovereignty or a part of it; and cannot be acquired otherwise than according to Natural Law, which regulates the sovereignty.

XIV. 1 Hence it appears how far we are to receive the doct

eam scilicet, quæ populi est, se vindicare : quia quod vi partum est imperium, vi possit dissolvi ; quod autem ex voluntate sit profectum, in eo pœnitere liceat, et mutare voluntatem. Nam et quæ vi parta primum sunt imperia, possunt ex voluntate tacita jus firmum accipere, et voluntas aut ex initio constituti imperii aut ex post facto esse potest talis, ut jus det quod in postêrum a voluntate non pendeat. Agrippa rex apud Josephum in oratione ad Judæos, qui ex præpostero repetitæ libertatis studio Zelotæ dicti sunt, sic ait : *Intempetivum est nunc libertatem concupiscere. Olim ne ea amitteretur certatum oportuit. Nam servitutis periculum facere durum est, et ne id subeatur, honesta certatio. At qui semel subactus deficit, non libertatis amans dicendus est, sed servus contumax.* Atque ipse Josephus ad eosdem : *Honestum quidem est pugnare pro libertate, sed id olim factum oportuit. At qui victi semel sunt et longo tempore paruerunt, si jugum excutiant, faciunt quod desperatorum*

De Bell. Jud.  
II. 16. § 4.

De Bell. Jud.  
V. 2. § 3.

*1 Honestum pugnare pro libertate, sed id olim factum oportuit*] Eadem ferme verba reperies in oratione comitis Blanderatensis ad Mediolanenses apud

Radevicum I. c. 40.

<sup>5</sup> De Juribus illis, qui dicuntur *mercæ facultatis*, et, inter alia, de *lutione pignoris*, legi dignissima Dissertatio singu-

which some put forth, that it is always lawful for subjects, if they can, to obtain their liberty, that is, Civil liberty; because the authority which was gained by force may be taken away by force; and in regard to that which was given voluntarily, they may repent and change their mind. [But this goes too far.] For authority gained at first by force may by tacit consent receive firm right: and the will exercised, either in the original institution of a government, or at an after period, may be such as to give a right which afterwards does not depend upon the will. King Agrippa said to the Zealots who were clamorous for liberty, It is now out of season to demand liberty. You should have fought formerly, not to lose it. For submission is a hard lot, and it is honourable to fight in order to avoid it. But when a person has once been overcome in such a struggle, if he shake off the yoke, he is no longer a lover of liberty, but an insurgent slave. And so Josephus himself said; and Cyrus to the king of Armenia. [See.]

2 But that a long forbearance of the king, such as we have before described, may be a sufficient ground of the people obtaining its liberty from a presumed relinquishment of imperial authority, is not to be doubted.

XV. But rights which do not involve daily exercise, but are exercised, once for all, at a convenient time, as the loosing of a pledge; also

*hominum est, non quod libertatem amantium.* Et hoc ipsum Cyrus olim Armenio regi dixerat, qui rebellioni suæ obtendebat libertatis pridem amissæ desiderium.

Xenoph. de  
Cyri Inst.  
lib. I. § 6, 7.

2 Ceterum quin et regis longa patientia talis, qualem supra descripsimus, possit populo sufficere ad pariendam libertatem publicam, ex præsumta imperii dorelictione, minime dubitandum arbitror.

XV. Jura vero, quæ non habent quotidianum exercitium, sed semel ubi commodum erit, ut luitio pignoris; item jura libertatis, quibus actus is qui exercetur non est directe contrarius, sed ei inest ut pars suo integro; velut si quis per centum annos societatem cum uno duntaxat vicino habuerit, cum tamen habere et cum aliis posset; non amittuntur nisi ex quo tempore intercessit prohibitio aut coactio, eique paritum est cum sufficienti consensus significatione: quod cum non juri civili tantum, sed et rationi naturali congruat, merito locum habebit etiam inter summæ fortunæ homines.

laris Collegæ mei Clarissimi et Juris peritissimi P. de Toullien, quæ tertio ordine est in *Dissertationum Juridicarum Triade*, Ultrajecti ann. 1706. edita.

De re ipsa dicemus in Notis Gallicis ad hunc locum. J. B.

\* *Ut luitio pignoris*] Vide Parutam *Historia Veneta* VII.

freely used rights\*, to which the act exercised is not directly contrary, but is contained in it as a part in the whole;—as if any one should for a hundred years have alliance with one only of his neighbours, when he might have it with others also;—are not lost, except for the time when prohibition or coercion intervenes, and obedience is rendered to it with a sufficient signification of consent; and since this agrees, not only with Civil Law, but with natural reason, will properly have place also among the most exalted persons. [Such persons will not attempt to control the exercise of those rights.]

\* In the table of contents at the head of the chapter, the subject of this section is thus given: *Rights which are mere facultatis, are not lost in any course of time; Jura mera facultatis* are Rights which a man possesses but is not bound to exercise.

## CAPUT V.

### DE ACQUISITIONE ORIGINARIA JURIS IN PERSONAS: UBI DE JURE PARENTUM: DE MATRIMONIIS: DE COL- LEGIIS: DE JURE IN SUBDITOS: SERVOS.

- |   |  |
|---|--|
| <p>I. <i>De jure parentum in liberos:</i></p>   |  |
| <p>II. <i>Distinctio temporis infantiae: et ibi de infantium dominio in res:</i></p>  | <p>XVI. <i>Posse quaedam connubia illicita contrahi, et tamen rata esse.</i></p>   |
| <p>III. <i>Temporis extra infantiam in familia:</i></p>   | <p>XVII. <i>Jus majoris partis in quibusvis societatibus.</i></p>  |
| <p>IV. <i>Ibi de jure coercendi liberos:</i></p>  | <p>XVIII. <i>Pari numero quae sententia praevaleat.</i></p>  |
| <p>V. <i>De jure vendendi liberos:</i></p>  | <p>XIX. <i>Quae sententiae dividendae aut conjungendae.</i></p>  |
| <p>VI. <i>Temporis extra infantiam et familiam.</i></p>   | <p>XX. <i>Absentium jus praesentibus accrescere.</i></p>   |
| <p>VII. <i>Distinctio potestatis parentum naturalis et civilis.</i></p>   | <p>XXI. <i>Ordo quis inter pares, etiam reges.</i></p>   |
| <p>VIII. <i>De jure mariti in uxorem.</i></p>   | <p>XXII. <i>In societatibus, quae fundamentum habent in re, sententiae aestimandae secundum partes quas quisque habet in re.</i></p> |
| <p>IX. <i>Insolubilitas et adstrictio ad unam uxorem an sint necessariae ad matrimonium ex lege evangelica.</i></p>   | <p>XXIII. <i>Jus civitatis in subditos.</i></p>  |
| <p>X. <i>Jure naturae solo irrita non esse connubia ob defectum consensus parentum.</i></p>   | <p>XXIV. <i>An civibus a civitate discedere liceat, per distinctionem explicatur.</i></p>  |
| <p>XI. <i>Ex lege evangelica irrita esse connubia cum alieno viro et uxore.</i></p>   | <p>XXV. <i>Jus civitati nullum in exules.</i></p>  |
| <p>XII. <i>Illicita et irrita esse jure naturae connubia parentum cum liberis.</i></p>  | <p>XXVI. <i>Jus ex consensu in filium adoptatum.</i></p>   |
| <p>XIII. <i>Connubia fratrum cum sororibus, item novercae cum privigno, et soceri cum nuru, ac similia, illicita et irrita esse jure divino voluntario.</i></p> | <p>XXVII. <i>Jus in servos.</i></p>  |
| <p>XIV. <i>Non idem videri de connubiis cum propinquis ulterioris gradus.</i></p>   | <p>XXVIII. <i>Quatenus in hoc jure dicatur inesse jus vitae ac necis.</i></p>  |
| <p>XV. <i>Posse esse quaedam connubia et licita, quae a le-</i></p>   | <p>XXIX. <i>Quid ex jure naturae statuendum de his, qui ex servis nascuntur.</i></p>   |
|   | <p>XXX. <i>Servitutis diversa genera.</i></p>  |
|   | <p>XXXI. <i>Jus ex consensu in populum, qui se subjicit.</i></p>   |
|   | <p>XXXII. <i>Jus ex delicto in personam.</i></p>   |

I. **N**ON in res tantum, sed et in personas jus quoddam acquiritur, et originarie quidem ex generatione, consensu, delicto. Generatione parentibus jus acquiritur in liberos: utrique, inquam, parentum, patri, ac matri: \*sed si contendant inter se imperia, præfertur patris imperium, ob sexus præstantiam.

II. 1 Distinguenda autem <sup>1</sup>sunt in liberis tria tempora: primum tempus imperfecti iudicii, τοῦ βουλευτικοῦ ἀτελοῦς, ut Aristoteles loquitur, dum abest προαίρεσις, vis electrix, ut Pol. I. c. ult. idem alibi: secundum tempus perfecti iudicii, sed dum filius Nic. III. 4.

\* Sed si contendant inter se imperia, præfertur patris imperium] Seneca libro III. controversia XIX: *Primæ partes sunt patris, secunda matris.* Chrysostomus I ad Cor. XI. 3. εικότως ὑποτάκται τῷ ἀνδρὶ ἡ γυνή. ἡ γὰρ ἰσοτιμία μάχην ποιεῖ· merito viro femina subicitur, nam æqualitas honoris pugnam parit. (Tom. III. pag. 409. Edit. Savil.) Idem ad Ephesios capite IV. ἀρχὴ δευτέρα ἐστὶν ἡ γυνή. μήτε οὖν αὐτῆ τὴν ἰσοτιμίαν ἀπαιτεῖτω (ὑπὸ γὰρ τὴν κεφαλὴν ἐστὶ) μήτε ἐκείνος ὡς ὑποταγμένης καταφροσέτω. σῶμα γὰρ ἐστὶ. *Secunda potestas est mulier: neque ergo ipsa æquum sibi jus vindicet (sub capite enim est) nec eam, quod subdita sibi est, contemnat maritus: corpus enim est.* (Tom. VI. pag. 865). Deinde: δευτέρα ἐστὶν ἀρχὴ αὐτῆ, ἀρχὴν ἔχουσα καὶ πολλὴν τὴν ὁμοτιμίαν, ἀλλ' ὅμως ἔχει τι πλεονὸν ἀνδρὶ· *Altera potestas illa est, imperium et ipsa habens,*

*multumque in honore consortii: sed tamen plusculum habet vir.* (pag. 867). Augustinus epist. XCIX: *Filius ex legitimis nuptiis susceptus magis in patris est, quam in matris potestate.* (Ep. 262. § 11, secundum divisionem Benedictin.) Gregoras libro VII. ubi de Andronico Palæologo et Irene agit: προστιθεμένου δὲ καὶ τοῦ, μείζονα δύνασθαι τῆς μητρὸς τὸν πατέρα, τὸ κωλύον οὐδὲν τῆν τοῦ πατρὸς τελεσθῆναι βούλησιν ἐπὶ τῷ παιδὶ μάλλον ἢ τῆς μητρὸς· *Addebat ille plus matre patrem posse, nec quicquam intercedere quominus patris de filio valeret voluntas, etiam præ materna.* (pag. 109. Edit. Genev. 1616). De reverentia matri debita vide L. congruentius. 4. c. *De Patria Potestate.*

<sup>1</sup> Confer, de toto isto argumento, PUFENDORFIUM nostrum, *De Jur. Nat. et Gent.* Lib. VI. cap. II. J. B.

CHAPTER V. *Of the original acquisition of Rights over Persons; wherein of the Rights of Parents; of Marriage; of Corporations; of Rights over Subjects, and over Slaves.*

I. There are rights over persons as well as over things; and these may be acquired by generation, consent, or delinquency.

Parents acquire a right over their children by generation; both parents, the father and the mother; but if there be a contention between the authorities, the authority of the father is preferred, as superior in sex.

II. 1 In Children, three periods of life are to be distinguished; first the period previous to years of discretion; next, the period when they have come to years of discretion, but remain part of the parents'

Ed. v. 10.

pars manet familiæ parentum, ἕως ἂν μὴ χωρισθῆ, ut loquitur idem Aristoteles: tertium postquam ex ea familiâ excessit.

<sup>b</sup> In primo tempore omnes liberorum actiones sub dominio sunt parentum: æquum enim est, ut qui se regere non potest, regatur aliunde. Æschyli dictum est<sup>2</sup>:

Ætas prima, ceu brutum pecus,

Ut educetur mentis aliensæ indiget.

At alius naturaliter inveniri non potest, cui regimen competat, quam parentes.

2 Est tamen eo quoque tempore filius aut filia capax domini in res ex jure gentium, sed exercitium impeditur ob eam quam diximus judicii imperfectionem. Habent jus, ut de pueris Plutarchus loquitur, ἐν κτήσει, non ἐν χροῆσει. Quare ut res omnes liberorum parentibus acquirantur non naturale est, sed ex quorundam populorum legibus, quæ et patrem a matre in hac re distinguunt, et filios non emancipatos ab emancipatis, et naturales a legitimis: quæ discrimina natura ignorat: excepta ea quam dixi sexus præstantia, si imperia inter se contendant.

Supra c. 3.  
§ 6.  
De Fort. Alex.  
ii. p. 337 c.

<sup>b</sup> In primo tempore] Sunt ea ætate ita parentum, ut alia quæ parentes possident, ait Maimonides canonibus Pœnitentialibus capite vi. § 2.

<sup>2</sup> Græca ita se habent:

Τὸ μὴ φρονεῖν γὰρ, ὡς περὶ βοῦν,  
τρέφειν ἀνάγκη, (καὶς γὰρ οὐ;) τρέφει φρονέει.  
Choephor. pag. 257 [v. 753.] J. B.

family; third, the period when they have gone out of the family. [See Aristotle.]

In the first period, all the actions of the children are under the dominion of the parents; for he who cannot govern himself must be governed by another; and the parents are the natural governors. [See Æschylus.]

2 Yet even in this period, a son or daughter is capable of ownership over things *jure gentium*; but the exercise of this right is impeded by their imperfection of reason. They have the right to have, but not to use. Therefore that whatever becomes the property of the child becomes the property of the parents, is not Natural Law, but is an institution of the laws of certain peoples; which also in this matter distinguish the father from the mother, and sons not yet emancipated from paternal control, from those who are emancipated, and natural children from legitimate; which distinctions are unknown to nature; except the superiority of sex, when the authorities interfere, as we have mentioned.

III. In the second period, when the reason is matured by time, those actions only are subject to the authority of the parents which

III. In secundo tempore, cum jam *judicium ætate maturitatis*, subsunt parentum imperiis non aliæ actiones, quam <sup>c</sup>quæ ad familiæ paternæ aut maternæ statum aliquid momenti habent; æquum enim est, ut pars conveniat cum ratione integri. In ceteris autem actionibus habent tum liberi *ἐξουσίαν*, id est, facultatem moralem agendi, sed tenentur tamen in illis quoque studere semper, ut parentibus placeant. Verum hoc debitum cum non sit ex vi facultatis moralis, ut illa superiora, sed ex pietate, observantia, et gratiæ rependendæ officio, non efficit ut irritum sit, siquid contra sit factum, sicut nec irrita est donatio rei a quocunque domino facta contra parsimoniæ regulas.

IV. In utroque hoc tempore jus regendi etiam jus cœrendi complectitur, quatenus nempe vel cogendi sunt ad officium liberi, vel emendandi. De gravioribus autem pœnis quid sit sentiendum, alibi erit agendi locus.

V. Quanquam vero imperium paternum ita sequitur ipsam patris personam ac *σκέσις*, ut avelli transferrique in alium non possit, potest tamen naturaliter, et ubi lex civilis non impedit, pater filium oppignorare, <sup>d</sup>et, si necesse sit, etiam ven-

<sup>c</sup> *Quæ ad familiæ paternæ aut maternæ statum aliquid momenti habent*] Ita explicat Maimonides legem, quæ est Num. xxx. 6.

<sup>d</sup> *Et, si necesse sit, etiam vendere*] Jornandes *Historia Gothica*: *Haud enim secus parentes faciunt, salutem suorum pignorum providentes, satius*

have some important bearing upon the state of the paternal or maternal family: for it is equitable that a part should follow the analogy of the whole. In other actions, the children have, at that period, the moral right to act; but are bound, even in those, to endeavour to please their parents. But since this obligation is not founded in a jural right, like the above obligations [at the earlier period], but in piety, reverence, and the duty of repaying the benefits they have received, it does not render void what is done in transgression of it; as a donation made contrary to the rules of prudence by the owner is not void.

IV. In both these periods, the parents' right of governing includes also the right of coercing, so far as children require to be compelled to their duty or amended. What is to be done concerning greater punishments, we shall discuss elsewhere.

V. But although the paternal authority so far follows the person and position of the father, that it cannot be taken from him and transferred to another, yet by the Law of Nature, and where the Civil Law does not impede, the father may put his son in pledge, and if necessary, even sell him, when there is no other means of providing



cap. 7.

dere, ubi alia ratio eum alendi non suppetit: quod ex veteri Thebanorum lege (quam libro secundo recitat Ælianus) in populos alios videtur fluxisse: ipsa autem lex Thebana a Phœnicibus ac porro ab Hebræis venisse: quam ipsam obtinuisse et apud Phrygas docet Apollonius <sup>3</sup>Epistola ad Domitianum. Censetur quippe ipsa natura jus dare ad id omne, sine quo obtineri non potest quod ipsa imperat.

VI. In tertio tempore filius in omnibus est *ἀντεξούσιος*, sui que juris, manente tamen semper illo pietatis et observantiæ debito, cujus causa perpetua est. Unde sequitur, regum actus irritos dici eo nomine non posse, quod parentes habeant.

VII. <sup>e</sup>Quicquid extra hæc est, a lege est voluntaria, quæ alibi est alia. Sic jure quod Deus Hebræis dedit, potestas patris in filium aut filiam, ad dissolvenda vota non erat perpetua, sed durabat quamdiu liberi <sup>f</sup>pars erant domus paternæ. Sic patria quædam potestas propria erat civium Romanorum, etiam in filios qui familiæ propriæ capita erant, quamdiu emancipati non erant. Qualem in liberos potestatem alios non habere ipsi Romani profitentur. Sextus Empiricus Pyrrhonorum tertio: οἱ Ῥωμαίων νομοθέται τοὺς παῖδας ὑποχειρίους καὶ δούλους τῶν πατέρων κελεύουσιν εἶναι. καὶ τῆς οὐσίας τῶν παίδων μὴ κυριεύειν τοὺς παῖδας, ἀλλὰ τοὺς πατέρας,

Num. xxx. 2,  
3, 4, 5. Lib.  
de Præcept.  
Leg. Præcept.  
Vol. ccxiii.

Inst. de Pat.  
Potest. § Jus  
autem §.  
Cap. 24. n.  
211.

*deliberant ingenuitatem perire quam vitam, dum misericorditer alendus quis venditur, potius quam moriturus servatur.* (Cap. 26. pag. 75. Edit. Vulcan.) Eam legem video et apud Mexicanos fuisse.

<sup>3</sup> Dicit in genere ἀποδίδοσθαι τοὺς αὐτῶν: additque, καὶ ἀνδραποδισθέντων μὴ ἐπιστρέφειν, et si forte quis ex suis in servitutem redigatur, non con-

vertuntur, ad illos scilicet liberandos. Vit. Apoll. Lib. viii. cap. vii. pag. 346. Edit. Olear. Ubi (quod obiter observare liceat) luculentum exemplum est loquutionis μὴ ἐπιστρέφειν, pro non curare: quod accedere potest iis, quæ plena manu congegit Clarissimus CLEVICIUS, ad explicandum τὸ Oculo irretorto spectare Poëtæ Venuini, Art. Crit.

for him; which appears to have passed to other nations from an old law of the Thebans: as the Theban law came from the Phœnicians, and higher still, from the Hebrews [Exod. xxi. 7, *And if a man shall sell his daughter to be a maidservant, &c.* Romulus made the same law. Dionys. Halic. 2, 28. Gronovius.] The same held with the Phrygians. Nature is conceived to give a right to do every thing without which that cannot be obtained which nature demands: [as the sustenance of children.]

VI. In the third period, the son is independent and *sui juris*, the duty of piety and reverence still remaining, as its cause is perpetual. Whence it follows that the acts of kings are not void because they have parents alive.

ἕως ἂν ἐλευθερίας οἱ παῖδες τύχῃσι κατὰ τοὺς ἀργυρωνήτους. παρ' ἑτέροις δὲ ὡς τυραννικὸν τοῦτο ἐκβέβληται. \**Legum Romanarum auctores liberos in manu parentum ad instar servorum esse voluerunt; neque suorum bonorum ipsis esse dominos, sed parentes, donec manumittantur eo modo quo mancipia solent: quod alii ut tyrannicum repudiant.* Simplicius ad Epicteti enchiridium: οἱ δὲ παλαιοὶ τῶν Ῥωμαίων νόμοι καὶ πρὸς τὴν τῆς φύσεως ὑπεροχὴν ἀποβλέψαντες, καὶ πρὸς τοὺς πόρους οὓς οἱ γονεῖς ὑπὲρ τῶν τέκνων ποιοῦσιν, ἅμα καὶ τοὺς παῖδας παντοδαπῶς ὑποτάξαι βουλόμενοι, καὶ τῇ τῶν γονέων οἴμαι φυσικῇ φιλοστοργίᾳ θαρρήσαντες, καὶ πιπράσκειν, εἰ βούλοιντο, τοὺς παῖδας τοῖς γονεῦσιν ἐπέτρεψαν καὶ φονεῦν αἰτιμωρήτως. *Antiquæ Romanorum leges, respicientes tum ad eam quæ a natura est eminentiam, tum ad labores quos pro liberis parentes sustinent, volentes præterea liberos parentibus sine exceptione subjectos esse, credo etiam confisæ naturali parentum amori, et venundandi, si vellent, liberos, et impune interficiendi parentibus jus dederunt.* Simile patrum jus apud Persas, ut tyrannicum accusat Aristoteles: quæ ideo a nobis afferuntur, ut accurate distinguamus civilia a naturalibus.

In cap. 37. p. 199.

Estic. Nte. vill. 12.

### VIII. 1 Ex consensu jus in personas quod oritur, aut ex

Part. I. cap. 2. § 11. J. B.

\* *Quicquid extra hæc est, a lege est voluntaria*] Seneca de Beneficiis III. c. xi. *quia utile est juventuti regi, imposuimus illi quasi domesticos magistratus.*

† *Pars erat domus paternæ*] Alloqui XIII. anno filius erat obligandi se capax

moribus Hebræis: ita illi ad dictum in numeris locum.

\* *Legum Romanarum auctores*] Philo in Legatione: ἡ γὰρ υἱοῦ παντελὴ ἐξουσία κατὰ τοὺς τῶν Ῥωμαίων νόμους ἀνάκειται πατρὶ. *Patri enim in filium omnimoda potestas jure Quiritium competit.* (Pag. 996 B.)

VII. Whatever goes beyond this, proceeds from instituted law, which is different in different places. Thus the right which God gave to the Hebrews, of making void the vow of a son or a daughter, was not perpetual, but lasted as long as they were part of the father's house. Thus the Romans had a *patria potestas* over sons, even those who were themselves heads of families, so long as they were not emancipated. This power over their children the Romans themselves remark that other nations had not. So Sextus Empiricus, Simplicius. [See.] Aristotle notes a similar right among the Persians as tyrannical. Where we are to distinguish accurately Civil Law from Natural Law.

### VIII. 1 The right over persons which arises *ex consensu*, from

Eph. v. 23.

consociatione venit, aut ex subjectione. Consociatio maxime naturalis in conjugio apparet: sed ob sexus differentiam imperium non est commune, sed maritus uxoris caput, nempe in rebus conjugii, et in rebus familiæ: nam uxor pars fit familiæ maritalis. Ideo de domicilio constituere jus est marito. Si quid ultra juris maritis conceditur, ut lege Hebræa jus rescindendi quævis vota uxoris, apud populos nonnullos jus vendendi bona uxoria, non a natura est, sed ab instituto. Exigit hic locus ut videamus quid sit de natura conjugii<sup>4</sup>.

2 Conjugium igitur naturaliter esse existimamus talem cohabitationem maris cum femina, quæ feminam constituat quasi sub oculis et custodia maris: nam tale consortium et in mutis animantibus quibusdam videre est. In homine vero, qua animans est utens ratione, ad hoc accessit fides, qua se femina mari obstringit.

<sup>4</sup> De tota ista materia confer PUFENDORF. *De Jure Nat. et Gent.* Lib. vi. cap. i. et quæ nos in Notis diximus, ut et ad libellum *De Officio Hom. et Civis*, Lib. II. cap. xi. ultimarum Editionum. J. B.

<sup>b</sup> *Viri sancti ante legem*] Chrysostomus de Sara: κακείνη πάλιν ἐσπούδασε τῆς ἀκαίδίας ἐπινοῆσαι παραμυθίαν αὐτῆς τινα ἀπὸ τῆς παιδείας· οὐδέπω γὰρ ταῦτα τότε κεκάλυτο· Ipsa vicissim studebat sterilis conjugii solatium ex ancilla querere: nondum enim talia tunc vetita erant. [In 1 ad

Corinth. cap. xi. pag. 414. Tom. III. *Ed. Savil.*] Eundem vide 1 ad Timoth. c. iii. (vers. 1. Tom. IV. pag. 286). Augustinus de doctrina Christiana libro III. cap. XII: erat uxorum plurium simul uni viro habendarum inculpabilis consuetudo. Similis habet ibidem cap. XVIII. Tum vero cap. XXII: *Multa enim sunt: quæ illo tempore officiose facta sunt, quæ modo nisi libidinose fieri non possunt*: et libro XVI. de Civitate Dei, cap. 38. *quoniam multiplicandæ posteritatis causa plures uxores lex nulla prohibebat.*

<sup>1</sup> *Et in lege*] Josephus *Antiq. Histor.*

consent, flows either from partnership or from subjection. The most natural form of partnership appears in marriage; but on account of the difference of sex, the authority is not common to the two; the husband is the head of the wife (Eph. v. 23); namely, in matters relating to the marriage union and to the family: for the wife is part of the husband's family. Thus to determine the place of domicile, is the husband's office. If any further rights are given to the husband, as by the Hebrew law, the right of disallowing the vows of the wife, and in some nations, the right of selling the wife's goods, this is not by Natural Law, but by institution.

The subject requires that we consider the nature of the marriage union.

2 Marriage, by Natural Law, we conceive to be such a cohabitation of the male and female, as places the female under the protection and custody of the male; for such a union we see in some cases in

IX. 1 Nec aliud ut conjugium subsistat natura videtur requirere: sed nec divina lex amplius videtur exegisse ante Evangelii propagationem. Nam et <sup>h</sup>viri sancti ante legem plures una uxores habuerunt, <sup>1</sup>et in lege præcepta quædam dantur his, qui plures una habeant, et regi præscribitur, ut nec uxorum nec equorum nimiam sibi adsciscat copiam, ubi Hebræi interpretes notant octodecim sive uxores sive concubinas regi fuisse concessas, et Davidi Deus imputat, <sup>k</sup>quod uxores ei complures et quidem illustres dedisset.

2 Sic et dimittere uxorem volenti modus præscribitur, nec dimissam ducere quisquam impeditur, præter eum, qui dimisit, <sup>1</sup>et sacerdotem. Hæc tamen ad alium maritum trans-eundi libertas ipso naturali jure ita restringenda est, ne inde oriri possit prolis confusio. Hinc illa apud Tacitum juris pontificii quæstio: *an concepto, necdum edito partu rite nuberet.*

XVII. 1. *πάτριον ἐν ταυτῷ πλείοσις ἡμῖν συνοικεῖν. Mos nobis patrius eodem tempore plures habere uxores.* (§ 2).

<sup>k</sup> *Quod uxores ei complures et quidem illustres dedisset*] Josephus eo historis loco: *δόντος δὲ αὐτῷ καὶ γυναῖκας, ἃς δικαίως καὶ νομίμως ἡγάγετο. cum Deus ei uxores dedisset, quas juste ac legitime habere posset.* (*Ant. Jud.* VII. 7. § 3). Pesictha ad Levit. XVIII. notissimum ait esse, eum qui dicat vetitum esse habere plures uxores nescire quid sit de lege.

<sup>1</sup> *Et sacerdotem*] Levit. xxi. 7. Re-pudiatis addita vidua ibidem vers. 14. quod de principe sacerdote intellexit Philo, (*De Monarch.* pag. 827 A.) et plerique hodie interpretes, ob ea quæ præcedunt commate 10. et deinceps. Sed quemvis sacerdotem intelligi debere ostendit Ezechiel xliv. 22. et in explicatione legis, ut et contra Apionem primo Josephus: connectenda ergo lex cum initio capituli, ut illa de pontifice maximo obiter sint interposita. [At vero Josephus diserte dicit, soli Sacerdotum principi vetitum esse ducere Viduam,

mute animals. But in man, as being a rational creature, to this is added a vow of fidelity by which the woman binds herself to the man.

IX. 1 Nor does nature appear to require any thing more for the existence of marriage. Nor does the divine law seem to have required more, before the propagation of the gospel. For holy men, before the law, had more than one wife; and in the law, precepts are given to those who have more than one; and the king is commanded not to have many wives, or horses; whence the Hebrew commentators note that the king might have eighteen wives or concubines; and God says to David that he had given him many wives.

2 And in like manner a process is appointed for him who wishes to put away his wife; and no one is prohibited from marrying her who is put away, except him who put her away, and a priest. But this liberty of going to another husband is to be so restricted, even

Apud Hebræos inter utrumque matrimonium tres menses interponi jubebantur. At Christi lex, <sup>5</sup>ut res alias, ita et hanc conjugii inter Christianos ad perfectiorem redegit normam, ex qua et qui dimisisset uxorem non adulteram, et qui duxisset dimissam, adulterii reos pronuntiat: et apostolus ejus atque interpres Paulus, non viro tantum jus dat in corpus uxoris, quod et in naturali statu procedebat (ὁ γὰρ μιγνύμενος κατὰ νόμον ἀφροδίτης παντός ἄρχει τοῦ σώματος τῆς συνούσης, inquit Artemidorus, id est, *qui connubii lege feminæ conjungitur, is in corpus ejus dominium habet*;) sed et uxori vicissim in corpus mariti. <sup>3</sup>Lactantius: *Non enim, sicut juris publici ratio est, sola mulier adultera est, quæ habet alium, maritus autem etiamsi plures habeat, a crimine adulterii solutus est. Sed divina lex ita duos in matrimonium, quod est in corpus unum, pari jure conjungit, ut adulter habeatur quisquis compagem corporis in diversa distraxerit.*

Matth. v. 32;  
xix. 9.

1 Cor. vii. 4.

Onetrocrist.

quam aliis Sacerdotibus id liceat: Τὸν δ' ἀρχιερέα μὲν τοι, οὐδὲ τεθνηκότος ἀνδρὸς ἠξίωσε γαμεῖν γυναῖκα, τοῦτο τοῖς ἄλλοις ἱερεῦσι συγχωρῶν. *Ant. Jud.* Lib. III. cap. xii. § 2. *Edit. Hudson.* In loco autem ex Lib. I. *contr. Apion.* § 7. de Vidua ne γὰρ quidem. Hinc Auctor in adnotat. ad locum Levitici laudatum plane omisit Josephi testimonium. Quod autem conjicit de parentesi, durum videtur. Confer SELDEN. *De Uxore Hebr.* Lib. I. cap. vii. et *de Success.* in

*Pontific.* Lib. II. cap. 2. *J. B.*]

<sup>5</sup> Auctor noster postea mutavit sententiam, ut patet ex Adnotationibus ejus in Matth. v. 32. ubi ostendit, in loco illo et aliis similibus Evangeliorum non damnati Polygamiam, sed tantum abusus Divortii, *quacumque ex causa facti.* Hinc in eximio opusculo *de Verit. Relig. Christ.* dicit tantum, *Christianos sequi morem Germanorum et Romanorum,* qui una uxore contenti fuerunt. Lib. II. § 13. Et in Nota subjecta ibidem re-

by Natural Law, that no confusion of offspring shall arise. Hence the question of pontifical law in Tacitus; *whether after the conception and before the birth of the child a woman might lawfully marry.* By the Hebrew law three months must be interposed between the marriages.

But the law of Christ refers, as other things, so this, to a more perfect rule; and by this, pronounces him who had put away a wife, except an adulteress, and him who married one thus put away, as guilty of adultery; and Paul, his Apostle and Interpreter, not only gives the man a right over the body of the woman, which also was the Natural Law, [see Artemidorus] but also gives the woman right over the body of the man. So Lactantius says that each party may be guilty of adultery.

3 I know that most hold that, in both these places, Christ did not establish a new law, but restored that which God had established in the beginning of things; and to this opinion they are led by the words

3 Scio a plerisque existimari in utroque hoc capite non novam a Christo conditam legem, sed restitutam quam Deus pater rerum primordio condiderat: in quam sententiam adduxisse eos videntur ipsa Christi verba, ubi ad primordium illud nos revocat: sed responderi potest, ex prima illa conditione, qua uni mari feminam non nisi unam Deus attribuit, satis apparere quid optimum sit Deoque gratissimum: et hinc sequi semper id fuisse egregium ac laudabile: non tamen ut aliter facere nefas esset: quia ubi lex non est, ibi non est legis transgressio; at lex de ea re nulla illis temporibus exstabat. Sic etiam cum dixit Deus sive per Adamum, sive per Mosem, tantum esse foedus matrimonii, ut vir parentis familiam relinquere debeat, quo novam cum uxore familiam constituat: idem ferme dixit quod Pharaonis filiæ dicitur Psalmo xlv. 11. *Obliviscere populi tui, et domus patris tui.* Et ex hac tam arctæ amicitiae institutione satis apparet <sup>a</sup>Deo gratissimum

mittit tantum ad locum 1 Corinth. vii. 4. Sed de ea re egimus in Notis nostris Gallicis. *J. B.*

<sup>a</sup> *Lactantius*] Libro institutionum vi. c. xxiii. ubi et hoc sequitur: *Exemplo continentia docenda est uxor, ut se caste gerat. Iniquum est enim, ut id exigas, quod ipse præstare non possis.* Sensus idem in Gregorio Nazianzeno, *πὺς ἀπαιτεῖς, οὐκ ἀντεισφέρεις; quomodo exigis et non rependis?* [*Orat.* xxxi. pag. 500 c.] Hieronymus ad

*Oceanum: Aliæ sunt leges Caesarum, aliæ Christi: aliud Papinianus, aliud Paulus noster præcipit. Apud illos viris impudicitia fræna laxantur, et, solo stupro atque adulterio condemnato, passim per lupanaria et ancillulas libido permittitur, quæri culpam dignitas faciat, non voluntas. Apud nos quod non licet feminis æque non licet viris, et eadem servituti pari conditione censetur.* (Tom. 1. pag. 198 c.)

<sup>a</sup> *Deo gratissimum esse*] Et multis

of Christ, where he speaks of what was in the beginning. But to this it may be answered, that doubtless, from that first condition, in which God gave one woman to only one man, it does sufficiently appear what is best and most agreeable to God; and hence it follows that such a condition was always excellent and laudable; but it does not follow that it was sinful to do otherwise; for where there is no law, there is no transgression; and at that time, there was no law on that point in existence. Thus when God said, either through Adam or through Moses, that the marriage union was so close that a man must leave the family of his parent to make a new family with his wife, it is nearly the same as what is said to Pharaoh's daughter, Psal. xlv. *Forget also thy people, and thy father's house.* From this institution of so close a union, it appears sufficiently that it is most agreeable to God that that conjunction should be perpetual; but it does not thence follow that God had then commanded that the tie should not be loosed on any account. But Christ forbid that man should put asunder what God had joined

esse, ut perpetua sit ea conjunctio: non tamen eo evincitur a Deo °jam tunc imperatum ne qua de causa fœdus illud solveretur. At Christus quod Deus institutione conjunxerat, id ab homine separari vetuit, ex eo quod optimum Deoque acceptissimum est, dignissimam lege nova desumens materiam.

Marc. x. 9.

4 Plerasque gentes certum est antiquitus ut divortiorum libertate, ita plurium feminarum conjugio usas. Prope solos barbarorum Germanos singulis uxoribus contentos suo tempore fuisse Tacitus memorat; idque passim ostendunt historiæ tum Persarum, <sup>P</sup>tum <sup>I</sup>ndorum. <sup>q</sup>Apud Ægyptios soli sacerdotes unius feminae conjugio utebantur. Sed et apud Græcos Cecrops primus, teste Athenæo, *μίαν ἐνὶ ἔξευξεν, unam feminam uni marito attribuit*: quod tamen ne Athenis quidem

De Morib.  
Germ. c. 18.  
Diod. l. p. 51.

olim quoque sapientibus prælatus hic mos. Euripides in *Andromacha* ex persona Hermiones (vers. 177, et seqq.):

οὐδὲ γὰρ καλὸν  
Διοὶν γυναικοῖν ἀνδρ' ἐν' ἡνίας ἔχειν·  
Ἄλλ' εἰς μίαν βλέποντες εὐναίαν Κύπριν  
Στέργουσιν, ὅστις μὴ κακῶς οἰκεῖν θέλει.

non etenim decet

Unum Imperare feminis geminis virum:  
Contentus uno conjuga vivat toro,  
Quicumque cuplet rite curatam domum.

Et in choro (vers. 464, et seqq.):

Οὐδέποτε' ἂν [l. οὐδέποτε] διδυμα  
Δέετρ' ἑταινίσω βροτῶν,  
Οὐδ' ἀμφιμάτορας κόρους,  
Ἐριν μὲν οἴκων,  
Δυσμενεῖς τε λύσας.  
Τὴν μίαν μοι στεργέτω πόσις γάμοις  
Ἄκοιμνήτην εὐνὰν ἀνδρός.  
Οὐδὲ γὰρ ἐν πάλεισι  
Δίπτυχοι τυραννίδες  
Μίας ἀμείνοτες φέρονται,  
Ἄχθος δ' ἐπ' ἀχθεῖ,  
Καὶ στάσις πολίταις.

Τεκτόνοιον θ' ὕμνοισιν ἐργάταιν δυοῖν  
Ἐριν Μούσαι φιλοῦσι κραίνειν.  
Πιοῖαι δ' ὅταν φέρωσι ναυτίλους θοαὶ  
Κατὰ κηβαλίαν,  
Διδύμα πραπίδων γυνῆα,  
Σοφῶν τε πλῆθος ἀβρόων ἀσθενέστερον  
Φανλοτέρως φρενὸς αὐτοκρατεροῦς  
Ἐνὸς ἂ δύναμις ἀνά τε μέλαθρα,  
Κατὰ τε πόλις,  
Ἐόσταν εὐρεῖν θέλωσι καιρόν.

Nunquam gemina de matre genus,  
Nunquam duplices laudabo toros,  
Odii et diræ semina rixæ.  
Unam debet non ambigui  
Vir participem nosse cubillis:  
Duo nec domini rectius urbes  
Terrasque regunt, quam quæ sceptrum  
Tenet una manus: quin sic oneri  
Onus accedit: discors agitat  
Rabiles rupto federe cives.  
Etiam artifices carminis inter  
Geminos ipse: tristia miscent  
Prælia Musæ: cumque in pelago  
Vela carinae fert aura levis,  
Plus una valet, contenta licet,

together; thus taking, from that condition which is best and most agreeable to God, matter most worthy of the new law.

4 It is certain that in ancient times most nations used both the liberty of divorce and also plurality of wives. Tacitus notices that the Germans were, in his time, almost the only barbarians who were content with single wives: and that appears constantly in the histories of the Persians and the Indians. Among the Egyptians, the priests alone had only one wife. In Greece, Cecrops was the first who gave one wife to one husband. And if any peoples had a more continent practice, as the Romans always abstained from two wives, and long from

diu observatum, Socratis et aliorum exemplo docemur. Quod si qui populi continentius egerunt, ut Romani semper duabus uxoribus, divortio diu abstinerunt, laudandi sunt sane, ut qui ad id quod optimum est accesserint: unde et flaminicæ apud eosdem Romanos matrimonium, nisi morte, non solvebatur: non tamen inde sequitur peccasse, qui fecerunt aliter ante promulgatam Evangelii vocem. Gell. xv. 20.

X. 1 Nunc quæ rata sint jure naturæ conjugia videamus: in quo dijudicando meminisse debemus, non omnia, quæ juri naturæ repugnant, irrita fieri jure naturæ, ut exemplo prodigæ donationis apparet; sed ea demum, in quibus deest principium dans validitatem actui, aut in quibus vitium durat in effectu. Principium et hic, et in aliis actibus humanis, unde

Dextera clavi quæ freno tenet,  
Quam consilii vis in partes  
Distracta duas, aut prudentum  
Numerosa cohors: una potestas  
Temperet urbem, rogat una domum,  
Si modo cordi est tranquilla quies.

Plautus *Mercatore* (iv. 6. 8):

Nam uxor contenta est, quæ bona est, uno viro.  
Qui minus vir una uxore contentus siet?

◦ *Jam tunc imperatum*] Sic et in causa plurium uxorum distinguit Ambrosius id, quod laudaverat in paradiso Deus, a damnatione contrarii c. iv. Lib. i. de *Abraham*. quem locum Gratianus posuit causa xxxii. quæst. iv. c. 3. [Vide quæ diximus in Tractatu Gallico *De Doctrina Morali Patrum Eccles.* cap. xiii. § 10, et seqq. J. B.]

◦ *Tum Indorum*] Et Thracum, de quibus versus sunt Menandri, (apud Strab. Lib. vii. p. 297) et Euripidis in *Andromacha*. (vers. 214. et seqq.)

◦ Vide STRABONEM, *Geograph.* Lib.

xv. pag. 714. J. B.

◦ *Apud Ægyptios soli sacerdotes*] Vide Herodianum libro ii. [Sine dubio Herodianus, apud quem nihil quod ad rem faciat, positus est heic pro Herodoto, undecumque error ortus fuerit. At hic contrarium plane docet, nimirum omnes Ægyptios una uxore contentos fuisse, quemadmodum in more erat Græcis: *Και γυναίκι μίῃ ἕκαστος αὐτέων συνοικίει, κατάπερ Ἕλληνες*. Lib. ii. cap. 92. Utri credemus? Herodoto, an Diodoro Siculo, ita inter se pugnantibus? J. B.]

◦ *Non tamen inde sequitur peccasse*] Augustinus libro xxii. c. xlvii. *contra Faustum*: *Quando mos erat, crimen non erat*. Posuit et hoc Gratianus, sed sub Ambrosii nomine. (Caus. xxxii. Quæst. iv. c. 7).

◦ *Ubi actus turpitudine est permanens*, ait Auctor Adnot. in Matth. xxii. 30.

divorce, they are to be praised as having made an advance to what was best. Hence also the wife of the Flamen Dialis, the priestess of Jupiter, could not have her marriage dissolved but by death. Yet still it does not follow that they sinned, who did otherwise before the promulgation of the Gospel.

X. 1 Let us now see what marriages are valid by Natural Law: in deciding which, we are to recollect that not everything which is contrary to the Law of Nature [that is to the moral nature of man] is void by Natural Law; as appears by the example of a prodigal donation: [which is contrary to the natural virtue of prudence, and



ius oritur, est jus illud, quod facultatem moralem interpretati sumus, simul cum voluntate sufficiente. Quæ voluntas sit sufficiens ad jus producendum, infra melius tractabitur, ubi de promissis in genere agetur. Super facultate morali quæstio oritur de parentum consensu, quem ad validitatem conjugii quasi naturaliter quidam requirunt. Sed in eo falluntur. Nam quæ adferunt argumenta, nihil aliud probant, quam officio filiorum conveniens esse, ut parentum consensum impetrent: quod plane concedimus cum temperamento, nisi manifeste iniqua sit parentum voluntas. Nam si in omnibus rebus filii reverentiam parentibus debent, certe præcipue eam debent in eo negotio, quod ad gentem totam pertinet, quale sunt nuptiæ. Sed hinc non sequitur jus illud, quod facultatis aut domini nomine explicatur, deesse filio. Nam qui uxorem ducit, et maturæ esse debet ætatis, et extra familiam abit, ita ut hac in re regimini familiari non subjiciatur. Solum autem reverentiæ officium non efficit, ut nullus sit actus qui ei repugnat.

Exemplum est in eo, qui rem alienam furatus est, aut mala fide possidet alio quocumque modo: quamdiu enim illam retinet, aut illa utitur, singuli actus habent contractionem rei alienæ. *J. B.*

\* *Mater, cui tamen naturaliter liberi reverentiam debent, suo dissensu matrimonium irritum non facit*] Imo et avi,

si is liber est, voluntas plus valet quam patris, qui servilis sit conditionis. *Gratian. causa 32. quæstione iiii. c. unic.*

† *Quarum verecundiæ maxime convenit hac in re alieno arbitrio stare*] *Non est enim virginis pudoris eligere maritum, ait Ambrosius Lib. 1. de Abraham. c. ult. relatus in codicem Gra-*

yet valid.] Those acts only are invalid, in which there is wanting a principle giving validity to the act, or in which the vice continues in its effect. The Principle, both here and in other human acts in which Right is created, is, that which we have called a moral Faculty or jural claim, joined with a sufficient Will.

What sort of Will is sufficient to create a Right, will be better treated further on, where we speak of promises in general. With regard to the jural claim, a question arises concerning the consent of parents, which some require as naturally requisite to the validity of marriage. But in this they are wrong; for the arguments which they adduce only prove how suitable it is to the duty of sons to obtain the consent of their parents: which we concede without hesitation, with this limitation only, that the will of the parents be not manifestly unjust. For if sons owe in all things a reverence to parents, they do so especially in a matter which has a national bearing, as is the case with marriage. But this does not shew that the right which we call a jural claim is not possessed by the son. For he who marries a wife ought to be of mature age; and he goes out of the family, so that in

2 Quod autem a Romanis aliisque constitutum est, ut quædam nuptiæ, quia consensus patris deficit, irritæ sint, non ex natura est, sed ex juris conditorum voluntate. Nam et eodem jure mater, cui tamen naturaliter liberi reverentiam debent, suo dissensu matrimonium irritum non facit; ac ne pater quidem filii emancipati: et si pater ipse sit in patris sui potestate, in filii nuptias et avus et pater consentire debent: filiæ avi auctoritas sufficit: quæ discrimina naturali juri incognita satis ostendunt venire hæc ex jure civili.

Lib. xxv. D.  
de Ril. Nupt.  
Lib. xvi. § 1.  
De cod. Tit.

3 In sacris literis videmus quidem pios viros, multoque magis mulieres, (quarum verecundiæ maxime convenit hac in re alieno arbitrio stare, quo et illa pertinent quæ priore ad Corinthios de elocanda virgine legimus) in contrahendis nuptiis secutos auctoritatem parentum: sed non tamen irritum pronuntiatur Esau conjugium, aut liberi illegitimi, quia sine tali auctoritate nuptias contraxerat. Quintilianus, jus strictum, et quidem naturale, respiciens, sic ait: *Quod si licet ali-*

L. xx. C. de  
Nupt.

vii. 38.

Gen. xxix. et  
xxxvi.

Decl. 257.

tiani causa xxxi. questione II. c. 13.  
Donatus *Andria* (IV. 4. 2): *Summa  
potestas nuptiarum in patre puella est.*  
Hermione apud Euripidem (*Androm.*  
vers. 987):

Νυμφευμάτων δὲ τῶν ἐμῶν πατὴρ ἐμὸς  
Μήτηρ μὲν ἔχει, κοῦν ἐμὸν κρίνειν ταῦτα.

Curam parenti de meis ego nuptiis  
Permitto, non est illud arbitrii mei.

Hero apud Musæum (vers. 179, 180):  
Ἄμφαδον οὐ δύνασθεθα γάμοις ὀπίοισι πελάσ-  
σαι.

Οὐ γὰρ ἐμοῖς τοκέσσι ἐπέυαδεν.  
Legæ maritall jungi non possumus ambo,  
Cum nollit mater, nollit pater.

this matter he is not subjected to the family government. And the duty of reverence alone does not make null an act which is contrary to it.

2 The rule established by the Romans and others, that certain marriages, because the consent of the father is wanting, shall be void, is not a rule of Natural Law, but depends on the Will of the lawgiver. For under the same rule, the mother does not make the marriage void by her dissent; though the children by nature owe obedience to her; nor does the father, after his son is emancipated; and if the father be still under the authority of his father, both the father and the grandfather must consent to the nuptials of the son, while for the daughter, the authority of the grandfather is sufficient; which differences, unknown to Natural Law, shew sufficiently that these rules come from the Civil Law.

3 In the Scripture we see indeed that pious men, and much more women, (whose modesty makes it suitable for them to act on another's will in this matter; to which view also pertains what is said 1 Cor. vii. 38, *He that giveth her in marriage, &c.*) have, in contracting marriages

*quando etiam contra patris voluntatem ea, quæ alioqui reprehensionem non merentur, filio facere; "nusquam tamen libertas tam necessaria quam in matrimonio est.*

XI. Cum ea quæ alteri nupta est matrimonium haud dubie irritum est, lege quidem naturæ, nisi vir prior eam dimiserit; tamdiu enim durat ejus dominium: lege autem Christi, donec mors vinculum dissolverit. Irritum autem est ideo, quia et facultas moralis deest, sublata per prius matrimonium, et omnis effectus est vitiosus. Singuli enim actus contractationem habent rei alienæ. Vicissim ex Christi lege irritum est conjugium cum eo, qui maritus sit alterius mulieris, ob jus illud quod Christus feminæ pudicitiam servanti dedit in maritum.

XII. 1 De conjugii eorum, qui sanguine aut affinitate junguntur, satis gravis est quæstio, et non raro magnis motibus

▪ *Nusquam libertas tam necessaria est quam in matrimonio*] Eugraphius ad *Andriam* actu x. scena v. *Tangitur et illud, an patrum imperiis obsequii filii debeant. Constat enim circa nuptias esse filii liberam voluntatem.* Casiodorus VII. 40. *Durum est libertatem liberam non habere [in matrimonio], unde liberi procreantur.*

× *Plutarchus attulit in questionibus Romanis*] Philo de *Legibus Specialibus* (pag. 780): *τι δὲ τὰς πρὸς τοὺς ἄλλους*

*ἀνθρώπων κοινωνίας καὶ ἐπιμιξίας ἐπέχει, εἰς βραχὺ χωρίον τὸ ἐκάστης οἰκίας συνωθεύοντας μέγα καὶ λαμπρὸν ἔργον, ἐκτείνεσθαι καὶ χεῖσθαι δυνάμενον εἰς ἡπείρους καὶ νήσους καὶ τὴν οἰκουμένην πᾶσαν; αἱ γὰρ τῶν ὀθνεῖων ἐπιγαμίαι καινὰς ἀπεργάζονται συγγενείας, τῶν ἀφ' αἵματος οὐκ ἀποδοῦσας, ὧν χάριν πολλὰς καὶ ἄλλας ὀμιλίας ἐκάλυψε. Quid opus hominum inter se necessitudines ac vincula inhibere, et unius domus angustiis claudere*

mony, conformed to the authority of their parents. Yet Esau's marriage [who took his wives of the daughters of Canaan, in spite of his father's disapprobation, Gen. xxviii. 8; xxxvi. 2] is not pronounced void, or his children illegitimate. So Quintilian, looking at strict Natural Law. [See.]

XI. Marriage with a woman already married to another, is doubtless void by Natural Law, except her former husband have dismissed her; for so long his authority over her continues. It is void because the jural claim is wanting, being taken away by the former marriage, and the whole effect [of the second marriage] is vicious. Every act connected with it is a trespass on what belongs to another.

On the other hand, by the law of Christ, marriage with him who is the husband of another woman is void, on account of the right which Christ has given a virtuous wife over her husband.

XII. 1 The question concerning the marriage of those who are connected by blood or affinity is sufficiently grave, and not unfre-

agitata. Nam causas certas ac naturales, cur talia conjugia, ita ut legibus aut moribus vetantur, illicita sint, assignare qui voluerit, experiendo discet, quam id sit difficile, imo præstari non possit. Nam quam <sup>1</sup>Plutarchus attulit in quæstionibus Romanis, et Augustinus sequitur de Civitate Dei, libro xv. cap. 16. de latius spargendis amicitiiis per diffusas affinitates, non tanti est ponderis, ut quod contra fiat irritum aut illicitum censeri debeat. Neque enim quod minus utile est, statim et illicitum est. Adde quod accidere potest, ut huic qualicunque utilitati alia major utilitas repugnet, neque eo duntaxat casu quem Deus in lege Hebræis data exceptit, ubi vir quispiam sine prole obiit, qui non dissimile est, quod de virginibus ex asse heredibus, quas *ἐπικλήρους* vocant, et Hebræo <sup>2</sup>et Attico jure constitutum est, ad conservandas scilicet in familia res avitas, sed aliis multis qui aut conspici solent, aut excogitari possunt.

Quæst. 108.  
p. 289 D.

*tam ingens ac præclarum opus, quod extendi fundique potest in regiones et insulas, orbemque universum? Affinitates namque cum extraneis novas pariunt conjunctiones hominum, non minores illis, quæ e sanguine veniunt: quod respiciens Moses alias etiam multas propinquorum nuptias vetuit. Chrysostomus ad 1 Corinth. xiii. 13. τί στενοχωρεῖς τῆς ἀγάπης τὸ πλάτος; τί περιττῶς ὑπόθεσιν ἀναλίσκεις εἰς αὐτὴν φιλίας, δι' ἣν δύνασαι καὶ ἐτέρων κορίσσεσθαι*

*φιλίας ἀφορμὴν ἐξῶθεν γυναῖκα ἀγαγών. Quid in arctum cogis amoris latitudinem? quid supervacuo amicitie causam perdis, per quam poteris aliam amicitie parandæ occasionem acquirere, extraneam ducendo uxorem? [Tom. III. pag. 469.]*

<sup>1</sup> *Et Attico jure] Vide Demosthenes ad Leocharem: Fortunatianum rhetoricum: Donatum Phormione act. I. scen. II. (vers. 75), et Adelphis IV. 5. 17.*

quently stirred with great vehemence. For if any one tries to assign certain and natural causes why such unions, in the cases in which they are forbidden by law or by usage, are unlawful, he will find that that is difficult, and indeed impossible. For the reasons given by Plutarch and Augustine [see], that social ties are to be extended more widely by diffusing our relationships, is not of such weight that what is done against it can be deemed void or unlawful. For that which is the less useful of two courses, is not thereby forthwith unlawful. Add, that it may happen that whatever the amount of utility on this side be, it may be outweighed by a greater utility on the other side; and that, not only in the case of exception mentioned in the Hebrew Law, when a man dies without offspring, (which is of the same kind as the rule about heiresses in the Hebrew and Attic law,) namely to preserve the property of the family in the family; but also in many other cases, which occur or may be imagined.

2 Ab hac generalitate eximo matrimonia parentum cujuscunque gradus cum liberis, quæ quo minus licita sint, ratio (ni fallor) satis apparet. Nam nec maritus, qui superior est lege matrimonii, eam reverentiam potest præstare matri quam natura exigit, nec patri filia; quia quanquam inferior est in matrimonio, ipsum tamen matrimonium talem inducit societatem, quæ illius necessitudinis reverentiam excludat. Bene Paulus Jurisconsultus, cum dixisset in contrahendis matrimoniis <sup>2</sup> naturale jus et pudorem inspiciendum, addidit contra pudorem esse filiam suam uxorem ducere. Talia igitur conjugia haud dubitandum quin et illicita sint, et irrita insuper, quia vitium perpetuo effectui adhæret.

L. *Adoptivus*,  
14. § *Servilis*,  
3. *D. de Rit. Nupt.*

3 Neque movere nos debet Diogenis et Chrysippi argumentum, a gallis gallinaceis aliisque animantibus mutis peti- tum, quo probare volebant commixtiones tales non esse contra jus naturæ. Nam, ut initio libri diximus, satis est, si cum natura humana quid pugnet, ut illicitum habeatur. Et hoc est incestum, quod <sup>a</sup> jure gentium committi scripsit Paulus jurisconsultis inter gradus ascendentium et descendentium. Hoc est jus illud quod Xenophon ait non eo minus jus esse,

L. *ult. de Rit. Nupt.*

Socrat. *Mem.*  
iv. 4. §§ 19,  
20.

<sup>a</sup> *Naturale jus et pudorem inspicien- dum*] Egrege hoc exsequitur Philo *de Specialibus Legibus*; ubi esse dicit μέγιστον ἀνοσιούργημα, maximum nefas, πατρός εὐνήν τετελευτηκότος, ἢν ἀψαυστον ὡς ἱερὰν ἐχρήν φυλάττεσθαι, καταισχύνειν, γήρως δὲ καὶ μητρός ἀδῶ μὴ λαμβάνειν, τὸν αὐτὸν τῆς αὐτῆς υἱὸν καὶ ἄνδρα γενέσθαι, καὶ πάλιν τὴν αὐτὴν νῦν μητέρα καὶ γυναῖκα. *Patris mortui cubile, quod, tanquam res sacra,*

*intactum sini oportuit, contemere, neque senectutis neque materni nominis verecundia tangi, eundem ejusdem esse filium et maritum, eandem ejusdem matrem et uxorem.* (Pag. 778 c. Edit. Paris.)

<sup>a</sup> *Jure gentium*] Sic et Papinianus loquitur in L. *Si Adulterium*. 38. § 2 D. *ad legem Juliam de Adulteriis*.

<sup>b</sup> *A Persis contemnebatur*] Quorum hac in re crimen bellis perpetuis, ac

2 From this general remark, I except the union of parents of any degree with their children; for, if I am not deceived, the reason why such unions are unlawful is apparent. For the husband, who is the superior by the law of matrimony, could not pay to his mother (being his wife) the reverence which nature requires; nor could a daughter to a father; for though she is inferior in the marriage union, yet the marriage introduces a companionship which excludes filial reverence. Paulus the Jurist says that Natural Law and modesty are to be regarded in contracting marriage, and adds, that it is against modesty for one to have his own daughter to wife. Such marriages, then, are both unlawful, and also void, because the vice has a perpetual effect.

quia <sup>b</sup>a Persis contemnebatur. Naturale enim recte dicitur, interprete Michaelē Ephesio ad Nicomachia, τὸ παρὰ τοῖς πλείστοις καὶ ἀδιαστρόφοις καὶ κατὰ φύσιν ἔχουσιν: quod apud plerosque non corruptos, sed naturæ convenienter se habentes obtinet. Hippodamus <sup>8</sup>Pythagoricus vocat παρὰ φύσιν ἀμέτρος ἐπιθυμίας, ἀκατασχέτους ὀρμὰς, ἀνοσιωπίας ἀδονὰς, immoderatas et a natura alienas cupiditates, effrænes impetus, nefarias voluptates. De Parthis sic Lucanus [Lib. VIII. vers. 401, et seqq.]:

Epulis vesana, meroque  
Regia, non ullos exceptos legibus horret  
Concubitus.

Et mox (vers. 409, 410):

Cui fas implere parentem,  
Quid rear esse nefas?

Speciatim autem huic Persarum mori causam pravam educationem prudenter assignat Dion Prusæensis oratione xx.

4 Atque hic mirari libet Socratis commentum apud Xenophontem, qui in conjugii talibus nihil culpandum invenit, præter ætatis disparitatem: unde aut sterilitatem ait sequi,

Immo xxi.  
p. 370 c.  
Memor. iv. 4  
§ 22.

fratrum cædibus, a Deo punitum notat Philo. (*De Special. Legib.* pag. 779). Persis addit Medos, Indos, Æthiops, Hieronymus Lib. II. *contra Jovinianum*. (Pag. 75. Tom. II.) de barbaris in universum Hermione in *Andromacha* Euripidis (vers. 173. et seqq.):

—Τοιοῦτον πᾶν τὸ βάρβαρον γένος.  
Πατὴρ τε θυγατρί, παῖς τε μητρὶ μέγιστα,  
Κόρη τ' ἀδελφῆ. διὰ φύσιν δ' οἱ φίλτατος  
Χωροῦσι, καὶ τῶνδ' οὐδὲν ἐξείργει νόμος.

Tale est omne barbaricum genus.  
Mater jugatur filio, natæ pater,  
Frater sorori: proximæ alterna manus  
Cæde implicantur: nulla lex prohibet nefas.

<sup>8</sup> Non, sed alius Philosophus ejusdem sectæ, nomine Hipparchus, in libro *de Animi Tranquillitate*, cuius fragmentum nobis servavit Stobæus. Reperitur illud etiam in *Opusculis Mythol. Phys. Ethic.* editis *Amstelod.* 1688. ubi locum, de quo agitur, leges pag. 670. J. B.

3 Nor need we be moved by the argument of Diogenes and Chrysippus, taken from cocks and hens, and other animals; by which they try to prove that such unions are not against Natural Law. For, as we have said in the beginning of this Book, it is enough, if anything is contrary to human nature, to prove it unlawful. And Incest between ascending and descending degrees is so. So Paulus, Xenophon, Michael Ephesius, Hippodamus, Lucan, Dio Prusæensis.

4 And here we cannot but wonder at the reasoning of Socrates in Xenophon, who finds nothing to blame in such marriages but the disparity of years, whence must follow either barrenness, or an ill-formed progeny. If this reason alone were the obstacle, certainly such unions would be neither unlawful nor void; any more than between other

aut male conformatam sobolem: quæ sola ratio si tali conjugio obstaret, certe nec irritum esset, nec illicitum, non magis quam inter alias personas, quarum ætas tot annis distat, quot annis parentes liberos solent præcedere.

5 Illud potius disquirendum, an non in hominibus nulla prava educatione corruptis, præter id quod intellectu concipi posse jam diximus, sit in ipsis affectibus insita fuga quædam commixtionis cum parentibus et ex se natis, quippe cum ab ea etiam quædam animantia muta naturaliter abhorreant. Ita enim et alii existimarunt, et Arnobius *adversus Gentes* libro quinto: *Etiamne in matrem cupiditatis infandæ spem Jupiter cepit, nec ab illius appetitionis ardore horror eum quivit avertere; quem non hominibus solis, sed animalibus quoque nonnullis natura ipsa subjecit, et ingeneratus ille communiter sensus?* Exstat de camelo et de equo Scythico nobilis in hanc rem narratio apud Aristotelem animantium historia nona, capite XLVII. et non dissimilis apud Oppianum libro primo *de Venatu*. Seneca Hippolyto (vers. 914, 915):

Feræ quoque ipsæ Veneris evitant nefas,  
Generisque leges inscius servat pudor.

XIII. 1 Sequitur quæstio de gradibus affinitatis omnibus et de gradibus sanguinis ex transverso limite, iis præser-

<sup>c De equo</sup> Plinius *Historia Naturalis* VIII. 42. ubi de equis agit, *Altum detracto oculorum operimento, et cognito cum matre coitu, petiisse prærupta atque exanimatum. Equæ et eadem ex causa in Reatino agro laceratum pro-*

*rigam invenimus. Namque et cognationum intellectus in iis est. Habes paria apud Varronem de Re Rustica II. 7. et apud Antigonum de Admirabilibus, (cap. 59). Aristotelemque ejusdem tituli libro. [Pag. 1150 B, c. Tom. I.*

persons whose ages are as different as those of parents and their children usually are.

5 We are rather to consider whether, in men not depraved by education, there is not, besides the reason given by the understanding, a certain horror of such union with parents and offspring, residing in the affections themselves; since even some animals have such a horror. So many have thought: Arnobius; Aristotle of the camel, and the Scythian horse; Oppian; Seneca in the Hippolytus.

XIII. 1 We must next consider the question concerning the degrees of affinity, and the degrees of consanguinity in a transverse line; especially those which are expressly mentioned, Levit. xviii. For though we should grant that these interdicts do not proceed from the mere Law of Nature, yet in virtue of the Divine precept, these unions may pass among forbidden things. And that the precept is one which

tim qui Levitici, cap. xviii. expressi leguntur. Nam etiam concessio, a mero jure naturæ non venire hæc interdicta, videri tamen possunt præcepto divinæ voluntatis hæc ivisse in vetitum: neque vero tale id esse præceptum quod solos Hebræos adstringat, sed quod homines universos, colligi videtur ex illis Dei verbis apud Mosem: *Ne polluite vos ulla harum rerum: quia omnibus istis polluti sunt populi, quos vobis advenientibus dispello.* Mox: *Ne facite ullam ex istis rebus abominandis: nam omnes istas fecerunt indigenæ terræ istius, quæ vobis exposita est, unde polluta est terra.* Lev. xviii. 24, 25, 27.

2 Nam si Cananæi eorumque vicini peccarunt talia faciendo, sequitur ut lex aliqua præcesserit: quæ cum mere naturalis non sit, restat ut a Deo data sit, aut ipsis peculiariter (quod non est verisimile, nec satis ferunt verba) aut humano generi, sive in prima constitutione, sive in reparatione post diluvium. Tales autem leges, quæ humano generi universo sunt datæ, non videntur a Christo abrogatæ, sed esse demum, quæ Judæos aliis nationibus, quasi sepimento interjecto, dis- Ephes. ii. 14. parabant. Cui accedit, quod Paulus conjugium privigni cum 1 Cor. v. 1. noverca tam severe detestatur: cum tamen nullum de ea re peculiare exstet Christi præceptum; nec ipse alio utatur argumento, quam quod talis commixtio <sup>d</sup>impura habeatur a pro-

At vide SELDENUM, *De Jure Nat. et Gent. secund. discipl. Hebræor.* Lib. 1. cap. 5. J. B.]

<sup>o</sup> Auctor ipse istius argumenti totam vim infringit paullo post, observatione quæ legitur in § sequ. num. 2.

J. B.

<sup>d</sup> *Impura habeatur a profanis etiam gentibus] Tertullianus v. adversus Marcionem: Non defendo secundum legem Creatoris displicuisse illum, qui mulierem patris sui habuit: communis et pub-*

---

does not bind the Hebrews only, but all men, seems to be collected from the words of God, Lev. xviii. 24, 25, 27, *Do not ye pollute yourselves, &c.*

2 For if the Canaanites and their neighbours sinned in doing such things, it follows that some law of God on that subject must have gone before; and as this is not merely a Natural Law, it remains that it was from God, either given to those nations peculiarly, (which is less probable, nor do the words carry that meaning,) or to the human race; either at the Creation, or at the restoration of things after the Deluge. And such laws, which were given to the whole human race, were not, it appears, abrogated by Christ; but those laws only which separated the Jews from other nations. Add to this, that Paul speaks of the marriage of a man with his father's wife as something shocking, though there is no special precept of Christ on that subject; nor



fanis etiam gentibus, quod veram esse præter alia ostendunt Charondæ leges, quæ tale matrimonium infamia notant: et illud in oratione Lysias: *ἑνωπείκει ὁ πάντων σκολιότατος ἀνθρώπων τῇ μητρὶ καὶ τῇ θυγατρὶ*, *maritus erat ille impurissimus hominum matris ac filia*: unde non abit Ciceronis illud pro A. Cluentio in causa non dissimili: nam cum socrum genero nupsisse narrasset, subdit: *O mulieris scelus incredibile, et præter hanc unam in omni vita inauditum!* Seleucus rex cum uxorem suam Stratonicen Antiocho filio nuptam daret, verebatur, <sup>e</sup>narrante Plutarcho, ne ipsa offenderetur *τῷ μὴ νενομισμένῳ, ut re illicita*. Apud Virgilium est (*Æn.* x. 389:)

cap. 6.

Vlt. Demetr.  
p. 907.

Thalamos ausum incestare novercæ.

Quæ communis existimatio si a necessario naturæ dictato originem non habuit, omnino sequitur, ut descendat ex veteri traditione, quæ a divino aliquo præcepto manarit.

3 Hebræi veteres, non spernendi hac in parte juris divini interpretes, et qui omnia eorum legit summoque iudicio digessit Moses Maimonides, aiunt earum legum, quæ capite Levit. xviii. de matrimoniis sunt proditæ, causas esse duas: priorem naturalem quandam verecundiam, quæ non sinat or-

*lice religionis secutus sit disciplinam.* (Cap. 7).

<sup>1</sup> Non sunt Lysias verba illa, sed An-  
docius, *Orat.* i. pag. 235. *Edit. Hanev.*  
1619. *J. B.* [Ceterum Charondam non  
vetuisse privignum novercæ conjungi,  
sed viduum uxore mortua liberis nover-  
cam superinducere notat ad *h. l.* Gro-

novius, quem sequitur *J. B.* erroris  
origine patefacta.]

<sup>e</sup> *Narrante Plutarcho*] In *vita De-*  
*metrii*: sed et Appiano in *Syriacis*, qui  
*ἀθεμιότιαν πᾶθους* amorem nefandum  
vocat. (Pag. 126.)

<sup>f</sup> *Aut etiam per personas sanguine aut  
nuptiali sanguinis commixtione coheren-*

does he use any other argument than that such a union is held to be impure even by the heathen. And that it is so appears in ancient authors. So Charondas; Lysias; Cicero; Plutarch; Virgil. And if this common opinion was not drawn from a dictate of nature, it follows that it descends from an old tradition originating in a divine precept.

3 \*The ancient Hebrews, who are not to be thought slightly of as commentators on this part of the divine law, and especially Maimonides, the greatest of them, says that there are two reasons for these laws, given Lev. xviii., concerning marriage: First, a natural modesty which does not permit persons to mingle with their own offspring, either in themselves, or in persons closely connected by blood or by marriage union: Second, lest the daily and confidential intercourse of certain

\* For the reasons against marriages of near relations, see *Elements of Morality*, 749 and 980.

tus auctores cum sua sobole, aut in se ipsis, <sup>f</sup>aut etiam per personas sanguine aut nuptiali sanguinis commixtione proxime cohærentes misceri: alteram vero, ne quarundam personarum convictus nimis quotidianus atque inobservatus stupris et adulteriis occasionem daret, si amores tales nuptiis possent conglutinari. Quas duas causas si cum judicio aptare velimus illis quas dixi divinis in Levitico legibus, facile apparebit in affinibus, qui in recto sunt limite (ut de parentibus et liberis nihil jam dicam, quippe quos, ut existimo, etiam sine expressa lege ratio naturalis jungi satis vetat) <sup>e</sup>item in sanguinis gradu transversorum primo, qui ob ortum a stirpe communi secundus dici solet, ob recentem admodum parentum in liberis imaginem, priorem causam valere, ut venientem de eo quod natura si non præcipit, certe honestius dictat; cujus generis multa materiam divinarum humanarumque legum faciunt.

4 Atque ideo Hebræi in recto limite, gradus etiam non nominatos a lege volunt comprehendendi, ob notissimam rationis paritatem. Istorum autem graduum hæc sunt apud ipsos nomina: Mater matris suæ: mater patris matris suæ: mater patris sui: mater patris patris sui: uxor patris patris sui: uxor patris matris suæ: nurus filii sui: nurus filii filii sui:

tes] Philo: ἀδελφὰ δὲ εἰ καὶ διαίρετα τὰ μέρη γεγόνασιν, ἀλλ' οὖν ἀρμόζονται τῇ φύσει καὶ συγγενεῖα μιᾷ. *Quantum enim divisæ sunt partes, fraternitatis jus retinent, ac cognatione, ut naturali vinculo, junguntur.* [Locus est *De Legib. special.* pag. 780 E. Sed qui,

si bene expendatur, nihil ad rem facere deprehendetur. *J. B.*]

<sup>e</sup> *Item in sanguinis gradu transversorum primo*] Et huc usque propinquis nuptiis abstinabant et Peruanii, et Mexicani. [Vide Joann. Letii *Itinerrar.* Cap. 17. *init.* *J. B.*]

persons should give occasion to sexual union, if such union could be confirmed by marriage. Which two causes if we judiciously apply to the laws given in Leviticus, it will easily appear that in the first transverse degree of blood, (brothers and sisters,) on account of the very recent image of the parents in the children, the first cause holds, as proceeding from that which, if nature does not command, at least she points out as more becoming: as there are many such things, which make the matter of divine and human laws.

4 Hence the Hebrews say that in the direct line the degrees not named in the law are comprehended, from the manifest parity of reason. These degrees they thus reckon: mother's mother; mother's father's mother; father's mother; father's father's mother; father's father's wife; mother's father's wife; son's daughter-in-law; son's son's daughter-in-law; daughter's daughter-in-law; son's daughter's daughter; son's son's daughter; daughter's daughter's daughter;

nurus filiæ suæ: filia filiæ filii sui: filia filii filii sui: filia filiæ filiæ suæ: filia filii filiæ suæ: filia filiæ filii uxoris suæ: filia filiæ filiæ uxoris suæ: mater matris patris uxoris suæ, mater patris matris uxoris suæ: id est, ut more loquar Romano, aviæ et proaviæ omnes, pronovercæ, proneptes, propri-vignæ, pronurus, prosocrus: quia scilicet et sub agnationis nomine comprehendatur similis cognatio, et sub primo gradu secundus, et sub secundo tertius, ultra quem vix est ut oriri controversia possit, cum alioqui, si posset, in infinitum eadem futura esset ratio.

5 Has autem leges, et ne fratres sororibus miscerentur, ipsi Adamo censent datas Hebræi simul cum lege de Deo colendo, jure dicendo, non fundendo sanguine, non colendis Diis falsis, non rapienda re aliena: sed ita ut leges conjugales vim suam non exsererent, nisi post multiplicatum jam satis humanum genus, quod ipso initio sine fratrum et sororum nuptiis contingere nequivit. Neque referre putant quod id a Mose <sup>h</sup>suo loco narratum non sit: quia satis habuit hoc in lege ipsa tacite indicasse, cum gentes extraneas eo nomine damnat. Multa enim talia esse in lege, quæ non temporis ordine, sed ex occasione dicantur: unde illa inter Hebræos celebris sententia: in lege non esse prius aut posterius, id est, multa referri ὕστερον πρότερον.

<sup>h</sup> *Suo loco narratum non sit*] Nam neque lex illa narrata est, ex qua Judas Thamarem comburi voluit. Sic Sichemitas Judith recte occisos ait, quod virgini stuprum intulissent, ix. 2. et Ruben patris maledicto feritur ob incestum.

[Ex his omnibus non potest tuto colligi, aliquam legem a Deo fuisse latam de adulterii aut raptus pœna, vel de incestu. Diximus in Notis Gallicis. J. B.]

<sup>g</sup> Locus est apud AUGUSTINUM, *De Civit. Dei* Lib. v. c. 10. nimirum escrip-

daughter's son's daughter; wife's son's daughter's daughter; wife's daughter's daughter's daughter; wife's father's mother's mother; wife's mother's father's mother: which the Romans express in a different way. And so in *infinitum* if it could be necessary.

5 These laws, and the law against the marriage of brother and sister, the Hebrews think were given to Adam at the same time with the laws, to worship God, not to shed blood, to worship no false gods, not to take what is another's. But they think that the laws concerning the conjugal union were given so that they should not be in force till the human race was to a certain extent multiplied; which could not take place at first without the marriage of brothers and sisters. Nor do they think it any objection to this account, that it is not given in the narration of Moses; for he held it sufficient to indi-

6 De connubio fratrum et sororum verba hæc sunt Mi-  
 chaëlis Ephesii ad quintum Nicomachiorum : τὸν ἀδελφὸν μίγ-  
 νυσθαι τῇ ἀδελφῇ ἐξ ἀρχῆς μὲν ἀδιάφορον ἦν. νόμου δὲ  
 τεθέντος μὴ μίγνυσθαι, πολὺ τὸ διάφορον. *Fratrem cum*  
*sorore concumbere ab initio res media erat: at, lege adver-*  
*sus tales concubitus posita, jam multum refert, observetur*  
*lex necne.* Diodorus Siculus vocat κοινὸν ἔθος τῶν ἀνθρώπων,  
 communem hominum morem, ne fratres sororibus jungantur,  
 a quo more Ægyptios eximit: Dion Prusæensis barbaros.  
 Seneca scripserat: <sup>2</sup> *Matrimonia Deorum jungimus, et ne pie*  
*quidem, fratrum scilicet et sororum.* Plato *de Legibus* octavo  
 talia conjugia vocat μηδαμῶς ὄσια, καὶ θεομοσῆ, minime pia,  
 sed Deo invisã. Vid. Cajet.  
in Mall. cap.  
19.

7 Quæ omnia ostendunt veterem famam de lege divina  
 adversus id genus conjugia, unde et vocem nefas de talibus  
 usurpari videmus. Omnes autem fratres et sorores compre-  
 hendi <sup>1</sup>lex ipsa indicat, tam agnatos quam cognatos ejus gradus,  
 sive foris, sive domi natos atque educatos comprehendens.

XIV. 1 Quæ manifesta expressio ostendere videtur dis-  
 crimem, quod est inter hos et alios remotiores gradus. Nam  
 ducere amitam agnatam vetitum est. At <sup>k</sup>filiam fratris, qui  
 par est gradus, ducere vetitum non est: imo ejus facti apud  
 Hebræos extant exempla. *Nova nobis in fratrum filias con-*

to deperdito. J. B.

<sup>1</sup> *Lex ipsa indicat*] Ubi vide Chal-  
 dæum paraphrasten: distinxerunt male  
 Spartiatæ, et Athenienses, et quidem  
 diversimode. [Vide SELDEN. *De Jure*  
*Nat. et Gent.* &c. Lib. v. cap. ii. et

Illustr. SPANHEMII *Commentarium in*  
*Orat. i. Juliani Imp.* pag. 89. et seqq.  
 J. B.]

<sup>k</sup> *Filiam fratris ducere*] Talem Abra-  
 hamo Saram fuisse Josephus putat.  
 (*Ant. Jud.* Lib. i. cap. xii. § 1. *Edit.*

cate this tacitly, by condemning other nations on that ground: For  
 that there are many things in the Law which are not told in the  
 order of time, but as occasion offers; whence that noted maxim of the  
 Hebrews, that in the Law there is no before and after.

6 On the union of brothers and sisters, see Michael Ephesius,  
 Diodorus Siculus, Dio Prusæensis, Seneca, Plato.

7 All which passages shew the ancient opinion of a divine law  
 against such marriages; whence we see they are called *nefas*.

XIV. 1 These manifest expressions shew what a difference there  
 is between these and remoter degrees. For to marry a father's sister  
 is forbidden; but a brother's daughter, who is in the same degree,  
 it is not forbidden to marry; and there are examples of it among  
 the Hebrews. So this was done at Romo and at Athens: See Tacitus,

Ann. xii. 6.

Vit. x. Orat.  
p. 836 n.

*jugia*: at aliis gentibus solemnia, nec lege ulla prohibita, inquit Tacitus. Athenis id licuisse ostendit <sup>3</sup>Isæus, et Lysiæ vita Plutarchus. Rationem adferunt Hebræi, quia viri juvenes assidue frequentant domos avorum et aviarum, aut etiam in iis habitant simul cum amitis: ad domos vero fratrum minus frequens ipsis est aditus, nec ibi tantundem habent juris. Quæ si recipimus, ut sane rationi sunt consentanea, fatebimur legem de non ducendis affinibus recti gradus, et sororibus, ex quo multiplicari cœptum est humanum genus, esse perpetuam: et hominibus communem, ut quæ honestate naturali nitatur, ita ut et irritum fiat, si quid factum sit adversus hanc legem, ob vitium permanens: at cæteras leges non item, ut quæ cautio- nem magis contineant, quæ cautio etiam aliis modis adhiberi potest.

Can. xviii.

2 Certe canonibus antiquissimis, qui apostolici dicuntur, qui duas sorores alteram post alteram duxisset, aut ἀδελφιδὴν, id est, fratris aut sororis filiam, tantum a clero arcetur. Nec difficilis est responsio ad id, quod diximus de peccato imputato

*Hudson.*) idem post datam legem exempla nobis dat in Herode, qui fratris filiam duxerat, et suam filiam fratri Pheroræ desponderat. Vide eum antiquæ historiæ xiv. et xvi. Phineo patruo promissa Andromede; Ovidius *Metamorphoseon* v. vers. 10. id postea apud Romanos vetitum permisit Claudius: vetuit Nerva: permisit Heraclius.

[Non unus error in hac Nota. I. Fallitur omnino Josephus, dum vult Saram fuisse filiam fratris Abrahami. Illa erat soror ejus ὁμοπάτριος, ut ipse ait Gen. xx. 12. ubi vid. Intt. II. Imp. Nerva, ubi vetuit ἀδελφιδὴν γαμεῖν, referente Xiphilino, pag. 241 A. Ed. Steph. filiam sororis, non fratris, intelligebat. Vide Cujac. Obs. xiiii. 16. et Clariss. Noodt.

Isæus, Plutarch. The Hebrews give a reason, that young men usually frequent the houses of their grandfathers and grandmothers, or even live in them along with their aunts; but they have not the same access to the houses of their brothers, nor so much freedom there. If we accept this, as indeed it seems to be reasonable, we must confess that the law of not marrying relations in the right line, and sisters, since the human race was multiplied, is perpetual; and common to all men, as depending on natural decency; so that whatever is done against this law is void on account of the abiding vice of condition: but that the other laws are not so; but contain rather a caution than a law, which caution may also be applied in other ways.

2 Certainly in the ancient (so called) Apostolical Canons, he who married two sisters successively, or his niece (the daughter of his brother or sister) was only excluded from the clerical office. Nor is it difficult to answer what was said concerning the sin imputed to

Cananæis et finitimis populis. Potest enim locutio universalis restringi ad præcipua ejus capitulis, ut de concubitu cum masculis, cum bestiis, cum parentibus, cum sororibus, cum nuptiis alienis, in quorum *προφυλακῆν*, et, ut Hebræi loquuntur, præmunimentum, additæ sint leges cæteræ. Nam de singulis partibus ne intelligatur, argumento esse potest interdictum de non habendis eodem tempore in matrimonio sororibus duabus: quod in commune datum olim humano generi fuisse Jacobi pietas, qui contra fecit, credere nos non sinit. Addi potest factum Amrami, qui pater Mosis fuit. Nam et is ante legis tempora amitam duxit uxorem: sicut materas <sup>1</sup>apud Græcos Diomedes et Iphidamas: Areten fratris filiam Alcinous.

3 Recte tamen fecerunt Christiani veteres, qui leges non illas tantum in commune datas, sed alias peculiariter Hebræo populo scriptas sponte sua observarunt: imo et ad gradus quosdam ultiores protenderunt verecundiæ suæ fines, ut hæc quoque in virtute non minus quam in ceteris Hebræos antecederent. Atque id pridem factum magno consensu ex cano-

Eust. ad II.  
xii. v. 234.  
Idem. in  
Odysse. vii. v.  
146.

Observ. II. 5. Hic etiam ibidem ostendit, neque post Senatusconsultum Claudianum in Provinciis licuisse filiam fratris ducere. III. Permissum id ab Heraclio, nescio cujus fide statuat Auctor. Ego reperio tantum, Imperatorem illum duxisse Martinam, fratris filiam, ut narant Zonaras, Paulus Diaconus, &c. J. B.]

<sup>2</sup> Nihil in hanc rem reperio apud Iseum. Forte Auctor in animo habuit DEMOSTHENEM, ex quo potest colligi, talem gradum vetitum non fuisse. Vide *Orat. adversus Leochar.* pag. 671 c. et *Orat. in Nearam*, pag. 617 c. J. B.

<sup>1</sup> Apud Græcos] Et Castori avunculo desponsam Electram ex Euripidis *Electra* discimus. (vers. 312).

the Canaanites and the neighbouring peoples. For the universal terms may be restricted to the principal heads: the *pollutions* of the Canaanites may be those which are mentioned Lev. xviii. 22, 23; and the other laws, concerning incest, are added as an outwork to these.

That the expressions cannot be understood of every part, we may see by the prohibition of having to wife at the same time two sisters, which we cannot suppose was a universal rule, since Jacob transgressed it. So Amram the father of Moses married his aunt, and among the Greeks, Diomedes married his mother's sister; Iphidamas, the same; Alcinus, his brother's daughter.

3 But the early Christians did well, who spontaneously observed, not only those Laws which were given as common to all, but also those peculiarly given to the Hebrew people; and even extended their modesty to other ulterior limits, so as to surpass the Hebrews in this virtue, as in other things. And it appears from the Canons that this was done. So Augustine says, that what was not forbidden, as marriage of

De Civ. Dei,  
xv. 16.

nibus apparet. Augustinus <sup>m</sup> de patruelium et consobrinorum conjugii inter Christianos loquens: *Raro, inquit, per mores fiebat quod fieri per leges licebat, quia id nec divina prohibuit, et nondum prohibuerat lex humana: verumtamen factum etiam licitum propter vicinitatem horrebatur illiciti.* Hanc morum vorecundiam leges regum ac populorum secutæ sunt: sicut <sup>n</sup> Theodosii constitutio patruelium et consobrinorum conjugia vetuit, laudante id factum, ut pietatis plenum, Ambrosio.

Epist. 68.

4 Sed sciendum simul est, ° non quod vetitum est fieri lege humana, si fiat, irritum quoque esse, nisi et hoc lex addiderit aut significaverit. Canon Eliberinus LX: Si quis post obitum uxoris suæ <sup>p</sup> sororem ejus duxerit, et ipsa fuerit fidelis,

<sup>m</sup> De patruelium conjugii] Æschylus Danaidibus. [Immo *Supplicibus*, [v. 38. ed. Dindorf.] ubi de Danaidibus] vocat *λέκτρα ὧν θέμις εἶργει, cubilia quæ jus prohibet*, et ait sic *μιαίνεσθαι γένος, fœdari genus*. At Scholiastes addit illegitimas fuisse tales nuptias, quod adhuc viveret virginum pater, quasi justæ futuræ fuerint eo mortuo, ex lege *τῶν ἐπικλήρων*. In oratione Sp. Ligustini civis Romani apud Livium est (Lib. xlii. c. 34): *Pater mihi uxorem fratris sui filiam dedit*. Vide et *Plauti Pænulum*. (V. 3. 37).

<sup>n</sup> Theodosii Constitutio] Victor de eo (Epit. c. 48): *tantum pudori tribuens et continentia, ut consobrinarum nuptias vetuerit, tanquam sororum*. Meminit et Libanius oratione *de Angariis*. Exstat Arcadii et Honorii lex ejusdem sensus, quæ tertia est C. Theodosiano *de Incestis Nuptiis*. Concedi tamen principum indulto solitas nuptias tales os-

tendit lex Honorii et Theodosii minoris alia eodem codice, titulo: *si nuptiæ ex rescripto petantur*. Secuti et Gotthi reges. Cassiodorus vii. 46: *Hoc prudentes viri sequentes exemplum, longius pudicam observantiam posteris transmiserunt, reservantem principi tantum beneficium consobrinis nuptiali copulatione jugendis*. Ubi et formulam habes talis veniæ principalis. [Arcadius et Honorius, qui primo imperii anno patris sui Constitutionem firmarant, post annos aliquot, permiserunt matrimonium inter Consobrinos, et Constitutionem hac de re editam Justinianus in Codicem suum retulit, L. 19. C. *De Nuptiis*. Vide Interpretes ad *Instit. Tit. De Nuptiis*, § 4. et præsertim magnum Interpretem Codicis Theodosiani, JAC. GOTHOFREDUM, in titulos ab Auctore nostro indicatos. *J. B.*]

° Non quod vetitum est lege humana, si fiat, irritum quoque esse] In Aga-

cousins, was avoided, as approaching forbidden ground. And this feeling was followed by the laws. Theodosius forbade the marriage of cousins, and Ambrose praised him for doing so.

4 But it is to be understood that what is forbidden by human law is not necessarily void when it is done, except the Law so directs. The Canon LX. of Seville says, if any one after the death of his wife shall marry her sister, he shall be excluded from the Communion five years; thus shewing that the tie of matrimony remains. And as we have said, in the Apostolical Canons, he who married two sisters, or a niece, was

per quinquennium eum a communione abstinet: eo ipso ostendens manere vinculum matrimonii. Et ut jam diximus, in canonibus, qui Apostolici dicuntur, qui duas sorores duxerit, aut fratris filiam, tantum clericus fieri prohibetur.

XV. 1 Ut ad alia pergamus, observandum hoc est, concubinatum quendam verum ac ratum esse conjugium, etsi effectibus quibusdam juris civilis propriis privetur, aut etiam effectus quosdam naturales impedimento legis civilis amittat. Exempli causa, inter servum et ancillam jure Romano contubernium esse dicitur, <sup>9</sup>non matrimonium: attamen ad ipsam conjugii naturam nihil deest in tali consociatione: quæ propterea in antiquis canonibus *γάμου* nomine appellatur. Sic inter hominem liberum et ancillam concubinatus dicitur, non matri-

thensi concilio post commemorata conjugia vetita, et inter ea de relicta fratris, additur: *Quod ita presenti tempore prohibemus, ut ea, quæ hactenus sunt constituta, non solvamus.* Retulit id Gratianus in questionem II. et III. causæ xxxv. c. 8. Simile quod a Paulo in sententias relatum est libro II. tit. xix. § 2. sine parentum consensu contractas nuptias injustas esse, sic tamen, ut non dissolvantur; nisi forte hæc postrema verba Anianus addidit. Tertullianus de conjugio cum infideli agens *ad uxorem secundo* (cap. 2), ait dominum magis ratum habere matrimonium non contrahi, quam omnino disjungi. Vide infra § XVI. [Apud Paulum vel legendum, vel subintelligendum, *sed contracta* (matrimonia scilicet) *[voluntate ejus Parentis] non solvuntur*, ut olim nimirum id fieri poterat. Vide omnino Notam Eruditissimi SCHULTINGII in hunc

locum; qui proinde nihil ad rem facit. *J. B.*]

<sup>v</sup> *Sororem ejus duxerit*] Lex Langobardica, Lib. II. c. viii. 3. *quia canones sic habent de duobus sororibus, sicut de duobus fratribus.*

<sup>9</sup> *Non matrimonium*] At serviles conjunctiones nuptiæ dicebantur in Græcia, Carthagine, in Apulia. Prologus ad Casinam Plauti. Sic et in legibus Langobardorum libro II. tit. xii. 10, et xiii. 3, et lege Salica tit. xiv. § 11, sed sine consensu dominorum non valuisse conjugia talia apud Hebræos, notatur ab ipsis ad Exodum xxi. ubi talium nuptiarum mentio, et apud Græcos Christianos, a Basilio in suis canonibus. (*Ad Amphilocho.* Can. 42.) Solitam etiam a principe veniam impetrari ducentis mulieris, quæ inæqualis esset conditionis, videmus apud Cassiodorum VII. 40.

only excluded from the Clergy.

XV. 1 To proceed to other matters, we may observe that, in some cases, concubinage is a true and valid marriage, although it be deprived of some of the peculiar effects of the Civil Law, and even lose some of its natural effects by the impediment of the Civil Law. For example, the union of a slave with a maid servant is, by the Roman Law, cohabitation, not marriage; but yet, in such a union, there is nothing wanting to the nature of marriage, which accordingly, in the old Canons, is called *γάμος*, marriage. And so the union between a free man and a female slave is called concubinage, not marriage;



monium: quod deinde imitatione quadam ad alias personas disparis qualitatis productum est: ut Athenis inter civem et peregrinam, unde Servius ad illud Virgilio (*Æn.* VII. 284):

Suppositos de matre nothos furata creavit:

Nothos interpretatur materno genere ignobiles et obscuros. Apud Aristophanem *Avibus* qui dixerat, νόθος γὰρ εἰ, κοῦ γνήσιος, dictum probat ὧν γε ξένης γυναικός: quippe cum ex peregrina natus sit. Et apud Ælianum γνήσιος definitur ὁς ἐξ ἀμφοῖν γέγονεν ἀστοῖν, qui utroque parente cive natus sit.

2 Atqui sicut in statu naturæ inter tales, quales jam diximus, conjugium verum esse potuit, si femina esset sub custodia maritali, et fidem marito dedisset: sic etiam in statu legis Christianæ verum erit inter servum et ancillam, aut liberum et servam conjugium; multoque magis inter civem et peregrinam, senatorem et libertam, si quæ jure divino Christiano sunt necessaria accedant, scilicet indissolubilis unius cum una con-

² *In statu legis Christianæ]* Vide in Gratiani collectione c. 1, de conjugii servorum. (*Decretal.* IV. 9. i.)

³ *Pro uxore concubinam habet]* De tali concubina Augustinus de *Fide et Operibus* (cap. 19): *de concubina quoque, si professa fuerit nullum se alium cognituram, etiamsi ab illo cui subdita est dimittatur, merito dubitatur, utrum ad percipiendum baptismum non debeat admitti.* Idem de *Bono Conjugii* cap. 5. Solet etiam queri, cum masculus et femina, nec ille maritus, nec illa uxor alterius, sibimet non filiorum procreando-

*rum, sed propter incontinentiam solius concubitus causa copulantur, ea fide media, ut nec ille cum altera, nec illa cum altero id faciat, utrum nuptiæ sint vocandæ. Et potest quidem fortasse non absurde hoc appellari concubium, si usque ad mortem alicujus eorum id inter eos placuerit, et proli generationem, quamvis non ea causa conjuncti sint, nam tamen vitaverint, ut vel nolint sibi nasci filios, vel etiam opere aliquo malo agant, ne nascantur.* Itaque in capitulari Francico VII. c. 255. dicitur: *Qui uxorem habet, eodem tempore concubi-*

and this name was afterwards extended to other persons of unequal quality; as at Athens, to a union between a citizen and a foreigner. So in Virgil, Aristophanes, Ælian, the child of a foreign mother by a citizen is called *nothus*, illegitimate. [See.]

2 But as in a state of nature, such unions as we have spoken of might be true marriage, if the woman was under marital custody, and had vowed fidelity to the husband; so also in the state of the Christian Law, a union between a slave and a male servant, or between a free man and a female slave, will be a true marriage; much more a union between a citizen and a foreigner, or a senator and a freed woman; if the conditions which are necessary by instituted Christian Law are present, namely, the indissoluble conjunction of one man and one woman; although some effects of the Civil Law may not follow this union, or some which would spontaneously follow may be impeded.

v. 1642.

Var. Hist.  
VI. 10.

unctio, etiamsi effectus quidam legis civilis non sequantur, aut alioqui sponte secuturi lege impediuntur. Atque hunc in sensum capienda sunt verba concilii Toletani primi: *Cæterum is, qui non habet uxorem, et pro uxore concubinam habet, a communione non repellatur: tamen ut unius mulieris, aut uxoris, aut concubine, ut ei placuerit, sit conjunctione contentus.* Cui adde locum in Clementis *Constitutionibus* lib. viii. cap. xxxii. Pertinet huc quod Theodosius et Valentinianus concubinatum quendam vocant inæquale conjugium, et quod inde adulterii accusatio nasci dicitur.

Dist. xxxiv. 4.

Lib. III. C. de Nat. Lib.

Lib. xiii. D. ad l. Jul. de Adult.

XVI. 1 Imo etiam si lex humana conjugia inter certas personas contrahi prohibeat, non ideo sequetur irritum fore matrimonium, si reipsa contrahatur. Sunt enim diversa, prohibere, et irritum quid facere: nam prohibitio vim suam exserere potest per poenam vel expressam, vel arbitrariam: et hoc genus leges imperfectas vocat Ulpianus, quæ fieri quid vetant,

Instit. T. 1. l. § 1.

nam habere non potest, ne ab uxore eum dilectio separet concubine.

Quæ fieri quid vetant, sed factum non rescindunt] Livius, libro x. (cap. 9.) Valeria lex, cum eum qui provocasset virgis cædi, securique necari veluisset, si quis adversus ea fecisset, nihil ultra quam improbe factum adjecit: id (qui tum pudor hominum erat) visum credo vinoulum satis validum legis: nunc vir seruo ita minetur quisquam. Lex Furia testamentaria plusquam mille assium legatum mortis causa prohibebat capere, præter exceptas personas, et adversus

eum qui plus cepit, quadrupli poenam constituebat, memorante Ulpiano. (Tit. i. § 2.) Macrobius circa finem eorum quæ scripsit ad somnium Scipionis (Lib. ii. c. 17): *Inter leges illa imperfecta dicitur, in qua nulla deviantibus poena sancitur.* Vide supra hoc capite § 14. in fine. Sic divus Marcus rescripsit: *Eum heredem, qui prohibet funerari ab eo, quem testator elegit, non recte facere: poenam tamen in eum statutam non esse.* (L. 14. § 14. D. De Religiosis et sumptibus funer.).

In this sense are to be understood the words of the first Council of Toledo: *He who, not having a wife, has a concubine, is not to be rejected from the Communion; so only that he be content with the society of one woman, whether wife or concubine.* Add to this, the passage in the Clementine Constitutions. So Theodosius and Valentinian call certain cases of concubinage unequal marriages, and say that a charge of adultery may arise out of them.

XVI. 1 And even if human Law forbid marriages between certain persons, it does not follow that the marriage is void, if it be really contracted. For these are two different operations, to prohibit, and to annul what is done. For prohibition may exert its force by a penalty either express or arbitrary. Ulpian calls this kind of Laws imperfect, which forbid a thing to be done, but do not rescind it if done. Such was the Cincian Law.

sed factum non rescindunt: qualis erat lex Cincia, quæ supra certum modum donare vetabat, donatum non rescindebat.

*L. non Dub.  
S. C. de Leg.*

2 Scimus apud Romanos postea Theodosii lege inductum: ut si quid lex prohibuerit tantum, non etiam specialiter dixerit inutile esse debere quod contra factum est, id ipsum tamen cassum, inutile, ac pro infecto sit, nimirum si in iudicium res deveniat: sed hæc extensio non fit ex vi solius prohibitionis, sed ex vi novæ legis, quam alii populi sequi necesse non habent. Sæpe enim indecentia est major in actu quam in effectibus: "sæpe etiam incommoda, quæ rescissionem sequuntur, majora quam ipsa indecentia, aut incommodum actus ipsius.

*Plot. de Pot.  
Civ. n. 14.*

XVII. Consociationes præter hanc maxime naturalem sunt et aliæ, tum privatæ, tum publicæ: et hæc quidem aut in populum, aut ex populis. Habent autem omnes hoc commune, quod in iis rebus ob quas consociatio quæque instituta est, universitas, et ejus pars major nomine universitatis obligant singulos qui sunt in societate. Omnino enim ea credenda est fuisse voluntas in societatem coeuntium, ut ratio aliqua esset expediendi negotia: est autem manifeste iniquum, ut pars major sequatur minorem: quare naturaliter, "seclusis pactis ac legibus, quæ formam tractandis negotiis imponunt, pars

" *Sæpe etiam incommoda, quæ rescissionem sequuntur, majora quam ipsa indecentia]* Ideo rex Alcinoüs Medeam reddi volebat patri, si deflorata nondum esset. Meminit Apollonius Argonautis, (vers. 1316, et seqq.) et ejus Scholiastes:

et in bibliotheca Apollodoros. (Lib. 1. c. 9. § 25.)

" *Seclusis pactis ac legibus]* Ut quæ volunt duas partes concordare, ut c. 6, de *Electione*.

" *Quod pluribus visum id valere]*

2 Afterwards there was a law of Theodosius made, that if the law had only prohibited a thing, and had not specially said that what was done in contradiction of it was void, yet that the thing so done was null, void, and of no effect; that is, if the matter came into a court of justice. But this was not in virtue of the prohibition alone, but of the new Law; and such a rule other nations are not bound to follow. For often the indecency in the act is greater than in the subsequent effect; and often the inconveniences which follow the rescinding of the act are greater than the indecency or inconvenience of the act itself.

XVII. Besides marriage, the most natural of partnerships, there are others, both private and public; and these latter, either partnerships in *populum* or *ex populis*. All partnerships have this in common, that in

major jus habet integri. Thucydides: κύριον εἶναι ὁ, τι ἂν Lib. v. 30.  
 τὸ πλῆθος ψηφίσηται. Appianus: ἔστι δ' ἔν τε χειροτο- De Bell. Civ.  
 νίας καὶ δίκαις αἰεὶ τὸ πλεόν δικαιοτέρον: tam in comitiis III. p. 500.  
 quam in judiciis vincit pars major. Dionysius Halicarnas-  
 sensis similiter: ὁ, τι ἂν δόξη τοῖς πλείοσι, τούτο νικᾶν, Ant. Rom. II.  
 ἢ quod pluribus visum, id valere. Et alibi: ὁ, τι δ' ἂν οἱ Lid. VII. 35.  
 πλείους ψήφοι καθαιρῶσι, τούτο ποιεῖν. Item: ὁ, τι ἂν αἰ Idid. c. 30.  
 πλείους γινῶμαι καθαιρῶσι, τούτο εἶναι κύριον. Aristoteles:  
 κύριον τὸ τοῖς πλείοσι δόξαν. Curtius, Lib. x. Eo quod Potit. IV. 8;  
 major pars decreverit, stetur. Prudentius [in Symmach. VI. 2.  
 I. 599]: Cap. 6. n. 18.

In paucis jam deficiente caterva

Nec persona sita est patriæ, nec curia constat.

Deinde (vers. 607, 608):

Infirma minoris

Vox cedat numeri parvaque in parte quiescat.

Apud Xenophontem hoc dicitur: ἐκ τῆς νικώσης πράττειν De Cyr. Exp.  
 πάντα, omnia agere secundum eam sententiam, quæ vincit. VI. I. § 11.

XVIII. Quod si pares sint sententiæ, nihil agetur: quia ad mutationem non satis momenti est: qua de causa ubi pares sunt sententiæ, reus absolutus intelligitur: quod jus Minervæ calculum Græci vocant ex fabula de Oreste: quæ res apud

Hunc sensum dant Chaldaeus Paraphras-  
 tes et Rabbinæ ad illud in Exodo xxiii. 3.  
 Adjungo l. duo 39, et l. Pomponius 38.  
 D. de re judicata; et quæ infra Lib. III.  
 cap. xx. § 4. et quæ paria cum Pruden-  
 tio habet Ambrosius contra Symma-

chum.

Reus absolutus intelligitur] L. inter  
 pares: 38. D. de re judicata. Vide Juli-  
 anum de Eusebia. (Orat. III. pag. 115  
 A. Edit. Spanhem.)

those matters for which the partnership was instituted, the whole body, and the majority as representing the whole, bind the special members of the partnership. For it must be supposed to have been the intention of those who united to make the society, that there should be some way of promoting business; and it is manifestly unjust that the greater part should follow the less; wherefore by Natural Law, not taking into account pacts and laws which prescribe a form for conducting business, the majority has a right to act for the whole. So Thucydides, Appian, Dionysius Halicarnassensis, Aristotle, Curtius, Prudentius, Xenophon. [See.]

XVIII. If the opinions are equally divided, nothing must be done; for then there is not so much power of movement as is requisite for a change. And for this reason, if the opinions of the judges are

Lib. I. contr. 5.

Æschylum *Furiis*, et apud Euripidem <sup>4</sup> *Oreste* et *Electra* tragœdiis tractatur. Sic et possessor rem tenet: quæ ratio non male observata est a scriptore problematum, quæ Aristoteli adscribuntur, sectione XXIX. In Senecæ controversia quadam est: *Alter judex damnat, alter absolvit: inter dispares sententias a mitior vincat*. Nam sic et in dialecticis collectionibus illatio eam partem sequitur, quæ minus onerat.

XIX. Sed hic quæstio oriri solet de conjungendis aut dividendis sententiis: qua de re ex mero jure naturali, id est, si pactio aut lex aliud non præcipiat, distinguendum videtur inter sententias, quæ totis rebus differunt, et inter eas, quarum altera partem alterius continet, ut hæc <sup>b</sup> conjungendæ sint in eo, quo conveniunt, illæ non item. Sic qui in viginti damnant, et qui in decem, conjungentur in illo decem adversus sententiam absolventem. At qui morte reum puniunt, et qui relegant, non conjungentur, quia diversa hæc sunt, et in morte non est relegatio. Sed nec absolventes cum relegantibus conjungentur, quia etsi non interficiendum reum consentiunt,

<sup>4</sup> *Oreste et Electra*] Etiam *Iphigenia in Tauris* (vers. 1470); in *Electra* sic ait:

Καὶ τοῖσι λοιποῖς ὅδε νόμος τεθήσεται,  
Νικᾶν ἴσοις ψήφοισι τὸν φεύγοντ' ἀεί.  
Idemque cunctis juris esto in posterum.  
Certante numero judicum ut vincat reus.

(vers. 1268.)

<sup>a</sup> *Mitior vincat*] Seneca in controversiis (1, 5): *Non est invidiosa po-*

*testas quæ misericordia vincit*. Imo apud Hebræos una sententia damnantium vincens pro nulla habebatur: ita Chaldæus ad dictum locum Exodi xxiii. et Moses de Kotzi præceptorum jubentium xcvi. et vetantium cxv.

<sup>b</sup> *Conjungendæ sint in eo, in quo conveniunt*] Ideo senatores dividere sententiam plura simul complectentem jubebantur, teste Asconio in Milonianam.

equally divided, the accused is acquitted; by what the Greeks call Minerva's vote. [See Æschylus and Euripides.] So too the person in possession keeps the property. [See Aristotle and Seneca.]

XIX. Here a question often arises how the votes are to be taken, together or separate. And here, so far as Natural Law goes, that is, if there be no pact nor precept of Law, there is to be a difference made between the opinions which are altogether different, and those of which one contains a part of another; and these latter are to be conjoined in the point in which they agree. Thus if one party of the judges would fine a man in 20 pounds, and one in 10, they are to be joined, as to the 10, against the party which would acquit. But those who vote for the death of the accused, and those who vote for his exile, are not to be conjoined; for death does not include exile. But also those that acquit must not be joined with those who vote for exile; because although they agree not to put the accused to death, that is

id tamen non est illud ipsum quod dicit sententia, sed per consequentiam inde elicitur: at qui relegat, non absolvit. Quare recte Plinius, cum tale quid in senatu evenisset, tantam dicit sententiarum esse diversitatem, ut non possent esse nisi singulæ; et parvulum referre, an idem displiceret, quibus non idem placuisset. Et <sup>c</sup>Polybius notat a Postumio prætore fraudem factam in rogandis sententiis, cum eos, qui captivos Græcos damnandos, et qui ad tempus retinendos censebant, contra absolventes conjungeret. Exstat hujus generis quæstio apud Gellium libro ix. et apud Curium Fortunatianum in loco de quantitatum comparatione: et apud Quintilianum patrem controversia cccxlv. ubi hæc verba sunt: *Jam aperte ex una plures facis: jam turbam istam, quæ universa noceret, dividendo extinguis. Duo exilium, duo ignominiam pronuntiant. Vis ego illos jungam, qui seipso dividunt?*

Lib. viii.  
Epist. 14.

Excerpt.  
Leg. 159.

Noct. Att. ix.  
15.

XX. Addendum et hoc: si qui absentia, aut aliter impediti jure suo uti non possunt, eorum jus interim accrescere

(Cap. 6.) Cicero *Epistolarum ad Familiares* 1, 2. *Itaque cum sententia prima Bibuli pronunciata esset, ut tres legati regem reducerent; secunda Hortensii, ut tu sine exercitu reduceres; tertia Volcatii, ut Pompeius reduceret; postulatum est, ut Bibuli sententia divideretur: quatenus de religione dicebat, cuique rei jam obsisti non poterat; Bibulo assensus est: de tribus legatis fratres ierunt in alia omnia. Seneca*

epistola xxxi. *Quod fieri in senatu solet, faciendum ego in philosophia quoque existimo: cum censuit aliquis, quod ex parte mihi placeat, jubeo illum dividere sententiam, et sequor. Idem de Vita Beata c. 3. Est et mihi censendi jus: itaque aliquem sequar, aliquem jubebo sententiam dividere: meminit ejus moris et Plinius Lib. viii. epist. 14.*

<sup>c</sup> Polybius] Vide ad eum locum Fulvii notæ.

not precisely what the vote expresses, but is deduced from it by a consequence, for he who exiles does not acquit. Whereupon Pliny, when something of this kind had happened in the senate, said that the diversity of opinions was so great that they must be taken singly; and that it made little difference that several rejected the same thing, if they could not all accept the same thing. So Polybius notes that Postumius the Prætor took an unfair course with regard to the Greeks, when he took the votes, and put together those who condemned them to slavery, and those who thought they should be kept for a limited time, against those who absolved them. So other cases in Gellius and in Quintilian.

XX. This also is to be added, that if any members are absent, or otherwise prevented from using their vote, their right devolves on those who are present. [See Seneca.]

Lib. iii. contr.  
19.

præsentibus: quod <sup>d</sup>Seneca in controversia quadam exsequitur: *Putate te servum esse communem: huic domino servies, qui præsens est.*

D. de Albo  
Scribendo.

XXI. Naturalis autem ordo inter socios hic est, prout quisque in societatem venit. Sic inter fratres is servatur ordo, ut qui primus natus est reliquos præcedat, atque ita deinceps, rejectis aliis omnibus qualitatibus: *Ἰσοὶ γὰρ*, inquit Aristoteles, *πλὴν ἐφ' ὅσον ταῖς ἡλικίαις διαλλάττονται*, *pares enim sunt fratres, nisi quatenus ætas eos distinguit.*

Æthic. Nic.  
viii. 12.

Lib. 1. C. De  
Consul. xii.

Theodosius et Valens in constitutione de ordine inter consules servando: *Quis enim in uno eodemque genere dignitatis prior esse debuerat, nisi qui prior meruit dignitatem?* Atque hic mos antiquitus in Christianorum quoque regum ac populorum societate obtinuit, ut qui primi Christianismum professi sunt, <sup>h</sup>in conciliis ad rem Christianam pertinentibus præcedant ceteros.

XXII. Illud tamen addendum est: quoties societas fundamentum habet in re, quam non æqualiter omnes participant,

<sup>d</sup> Seneca in controversia quadam] Libro III. contr. xix. [Sed casus est paulo diversus, ut patet. J. B.]

<sup>e</sup> Qui præsens est] Ita ut et ad unum recidere possit nomen universitatis I. sicut. 7. § 2. D. quod cujusque universitatis nomine, ubi Wesembecium vide. Adde I. rescriptum, 10. D. de Pactis. Zas. in paratit. D. de Pactis. Bart. in Lib. I. num. 3. de albo scribendo. Bær. decia. I. num. 4. Antonium Fabrum codice Sabaudico, Lib. I. tit. iii. definit. 40. Reinking. Lib. I. classe v. c. 8.

Sæpe tamen et hic, ut in illa regula de majore parte, leges exceptionem dant, puta ut duæ partes adesse debeant L. Nulli, 3. D. dicto titulo, quod cujusque univ. nomine L. nominationum, 46. C. de decurionibus: ut absentes præsentibus vices suas mandare aut suffragium per procuratorem dare possint c. si quis justo, 46. de Electione in vi.

[Naturalis ordo] De præcedentiis vide, si lubet, M. Antonium Nattam cons. Ioc. n. 22. et cons. Ioc. LXXVIII. num. 31. Mart. Wachter consiliis Cæs-

XXI. The natural order of precedence in a partnership is the order in which the members have come into it. So the eldest brother always retains his superior privileges. See Aristotle. So Theodosius and Valens, of precedence between the Consuls. So in the general association of Christian kings and nations, formerly those had precedence in the councils who had first professed Christianity.

XXII. It is to be added however, that when a partnership has its foundation in property which all do not equally share in; as if, in an inheritance or other estate, one person has a half, one a third, one a fourth; then, not only is the order of precedence to follow the order of shares, but also the weight of the votes must be proportional to the shares. And as this is the rule of natural equity, so is it also.

ut si in hereditate aut fundo alius dimidiam partem habeat, alius tertiam, alius quartam, tunc non tantum ordinem sumendum ex modo participationis, sed et sententias ad eum modum, id est, mensoria, ut loquuntur, proportionem æstimandas. Quod sicut naturali æquitati convenit, ita Romanis quoque legibus probatum est. Ita narrat Strabo cum Cibyra et tres vicinæ urbes in unum quasi corpus coiissent, convenisse, ut aliarum singula essent suffragia, Cibyræ bina, eo quod in commune hæc multo plus ceteris conferret. Idem in Lycia viginti et tres ait fuisse urbes, quarum <sup>1</sup>aliæ terna, <sup>2</sup>aliæ bina, aliæ singula ferrent suffragia, et ad eundem modum onera tolerarent. Sed recte notat Aristoteles id ita demum æquum fore, *εἰ κτημάτων χάριν ἐκοινωνήσαν, εἰ possessionum causa inita est societas.*

L. 2. D. de  
Fact. L. 14.  
D. Depositi.  
L. 16. D. de  
Reb. Auct.  
Jud. Possid.  
Lib. xiii. p.  
631.

Lib. xiv. p.  
665.

Polit. iii. 2.

XXIII. Consociatio, qua multi patres familiarum in unum populum ac civitatem cœunt, maximum dat jus corpori in partes: quia hæc perfectissima est societas: neque ulla est actio hominis externa, quæ non ad hanc societatem aut per

saris in controversia Saxonica. [Addi potest Diatriba singularis *De Jure Præcedentia*, a JACOBO GOTHOFREDO, summo Icto, conscripta, et ex ejus secundis curis longe auctior edita *Genevæ*, 1664. J. B.]

<sup>1</sup> *Nisi qui prior meruit dignitatem*] Adde L. omnes, 2. C. ut dignitatum ordo servetur. L. semper, 5. D. de jure immunitatis. L. ult. C. de tironibus.

<sup>2</sup> *In conciliis*] Joh. Fico, cons. latino LXXVII. n. 16. Afflictus decis. Neap. 1. n. 8. Bart. in l. 1. D. de albo scri-

bendo. Innoc. in c. Tua. de Majoritate et obedientia. Ant. Tessaurus 1. quæst. for. XLVIII. n. 5. Tiberius Decianus responso XIX. n. 183. et seqq. Innocentius Butr. Felin. in c. statuimus D. tit. de Majoritate. Bal. in Decernimus, in 2. notabili, c. de Sacrosanctis ecclesiis. Sed præcipue vide Æneam Silvium in concilii Basileensis historia. [Confer Auctoris *Epistolas* 722, 797.]

<sup>1</sup> *Aliæ terna, aliæ bina*] Sic in Smalcaldico fœdere Saxo duo habebat suffragia.

the rule of the Roman Law. So Strabo mentions a league between Cibyra and those neighbouring cities in which Cibyra had two votes, (as contributing more;) the others, one each. And again, in Lycia, he says there were 23 cities of which some had 3 votes, some, 2, some, one only, and bore the burthens in the same proportion. But, as Aristotle says, this is right, if the partnership be formed for the sake of possession.

XXIII. An association in which many fathers of families coalesce into one people and state, gives the greatest right to the body over its parts; for this is the most perfect society; nor is there any external act of man which either does not regard this society of itself, or may not regard it from circumstances. It may, as Aristotle says, make laws on all subjects.



se spectet, aut ex circumstantiis spectare possit. Et hoc est quod ab Aristotele est proditum: *τοὺς νόμους ἀγορεύειν περὶ πάντων, leges de omnis generis rebus præcipere.*

*Moral. v. 3.*

[olim et apud Argivos: Ovid. II. Metam. 26. G.]

L. 22. D. ad Municip. § 2.

XXIV. 1 Solet hic illud quæri, <sup>k</sup>an civibus de civitate abscedere liceat, venia non impetrata. Scimus populos esse, ubi id non liceat, ut apud Moschos: nec negamus talibus pactis iniri posse societatem civilem, et mores vim pacti accipere. Romanis legibus, saltem posterioribus, domicilium quidem transferre licebat: sed non eo minus qui transtulerat municipii sui muneribus obligabatur. Verum in quos id constitutum erat, ii manebant intra fines imperii Romani: atque ea ipsa constitutio specialem spectabat utilitatem tributariæ præstationis.

2 At nos quid naturaliter, si nihil aliud convenerit, obtinere debeat quærimus: nec de parte aliqua, sed de tota civitate, sive unius summi imperii complexu. Et sane <sup>l</sup>gregatim discedi non posse, satis expeditum est ex necessitate finis, quæ jus facit in moralibus: <sup>m</sup>nam id si liceat, jam civilis societas

<sup>k</sup> *An civibus de civitate abscedere liceat*] Vide hac de re fœdera Helvetica apud Simlerum (pag. 203. *Ed. Elzevir.* 1627) et alios. Servius in excerptis Fuldensibus II. *Æneidos* (vers. 156): *Consuetudo antiqua fuerat, ut qui in familiam vel gentem transiret, prius se abdicaret ab ea, in qua fuerat, et sic ab alia reciperetur.* Exempla fidei regibus

renuntiatis vide aliqua apud Marianam, ac postremum illustre libro XXVIII. c. 13.

<sup>l</sup> *Gregatim discedi non posse*] Zonaras de Lazo rege agens, qui a Persis ad Romanos defecerat: *τοῦτο αἰτιον μάχης Ῥωμαίοις καὶ Πέρσαις ἐγένετο, ὡς τοῦ βασιλέως Ῥωμαίων τοὺς αὐτοὺς ὑπέκοντας σφετερισμένου.* Id belli initium Romanis ac Persis fuit, quod

XXIV. 1 It is often asked, whether citizens may quit the State without leave obtained. We know that there are peoples where this is not permitted, as the Muscovites; nor do we deny that civil society may be formed on such a pact, and that usage may take the force of a pact. By the Roman Laws, at least in their later forms, a person was allowed to remove his domicile; but he who had done so, was still bound by the obligations of the town to which he belonged. Those who were under such rule remained within the limits of the Roman empire, and the rule referred specially to the interests of the tributary collection.

2 But the question for us is, What ought to be the rule by Natural Law, if no agreement has been made; and this, as relates, not to any part only, but the whole of the state or the whole body of a sovereign empire. And that the subjects may not depart in large bodies, is evident enough from the necessity of the end, which gives a right in moral matters; for if that were permitted, Civil Society could no longer subsist. With regard to the emigration of individuals, the case

subsistere non possit. De singulorum discessione alia res videtur, sicut aliud est ex flumine aquam haurire, aliud rivum diducere. *De sua cuique civitate statuendi facultas libera est*, ait Tryphoninus. Cicero pro Balbo laudat jus illud, *ne quis in civitate maneat invitus, et fundamentum vocat libertatis, sui quemque juris et retinendi, et dimittendi esse dominum*. Tamen hic quoque servanda est regula naturalis æquitatis, quam Romani in privatis societatibus dirimendis secuti sunt, ut id non liceat si societatis intersit. Semper enim, ut recte inquit Proculus, non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit. <sup>m</sup>Intererit autem societatis civilis non abire civem, si magnum contractum sit æs alienum, nisi paratus sit civis in præsens partem suam exsolvere: item si fiducia multitudinis bellum sit susceptum, præsertim si obsidio immineat, nisi paratus sit civis ille alium æque idoneum substituere, qui rempublicam defendat.

*L. in Bell. 12.*  
§ 9. *D. de*  
*Capt. et Post.*  
Cap. 13.

*L. Actions, 65.*  
§ *Labeo, 5.*  
*D. Pro Socio.*

3 Extra hos casus credibile est ad liberam civium discessionem consentire populos, quia non minus ex ea libertate commodi sentire aliunde possunt.

*Romanus princeps ad se avocaret Persis subditos.* [Dicendum erat, *de Lazorum Rege*, non *de Lazo rege*. Et nomen erat Trathus. Locus est in Justini Thracis vita. Lib. xiv. cap. v. *J. B.*]

<sup>5</sup> Vix accidere potest, ut gregatim Cives discedant, nisi quando aut imperium tyrannicum factum fuit, aut

calamitate quadam vel quocumque alio casu multi homines in civitate non amplius reperiant unde victum querant. Uterque autem casus tacite exceptus intelligitur in pacto, quo aliquis Civitatis se obstrinxit. *J. B.*

<sup>m</sup> *Intererit autem societatis*] Bembus libro vii.

is different; as it is one thing to take water out of a river in a vessel, another thing to turn off a part of the river by a side cut. Some hold that each ought to be at liberty to choose his own city: so Tryphoninus; Cicero. But here the rule of natural equity is to be observed, which the Romans followed in winding up the affairs of private societies; that it should not be done, if the interests of the society forbade: That is to be done, said Proculus, not which is the interest of one member, but of the whole society. And it is for the interest of the society that a citizen should not leave the country, if the country be greatly in debt, except the citizen is prepared to pay his part; and again, if the country have undertaken war, relying upon its population, especially if a siege be likely; except that citizen be willing to find a substitute to take his place in defending the country.

3 Except in these cases, it is to be supposed that a people agree to the free departure of citizens; for they derive advantages from it in other ways.

XXV. Sic <sup>in</sup> exules nullum jus civitati. Heraclidæ Argis ejecti ab Eurystheo, per tutorem suum Iolaum, sic loquantur apud Euripidem (*Heraclid.* vers. 186):

Quo jure jam nos ad Mycenæos trahat,  
Eadem agentes urbe quos urbe expulit?  
Nunc ergo cives non sumus.

*Orat. de  
Egipis, p.  
346 D.*

Alcibiadis filius in Isocratea oratione agens de temporibus ejecti patris: *ὅτ' οὐδὲν αὐτῷ τῆς πόλεως προσῆκεν. °cum nihil ad illum civitas nostra pertineret.* Jam vero plurium populorum, sive per se, sive per capita sua consociatio fœdus est, de cujus natura et effectu locus agendi erit, ubi ad obligationem ex pacto erit devenitum.

XXVI. Subjectio ex consensu, aut privata est, aut publica. Subjectio privata ex consensu esse potest multiplex, sicut multiplicia sunt regiminum genera. Nobilissima species est arrogatio, qua quis sui juris se ita dat in familiam alterius, ut ei subsit ad eum modum, quo filius qui maturæ est ætatis, subest patri. Pater autem filium suum eo modo dare alteri non potest, ut jus paternum plene in eum transeat, et ipse paterno officio exsolvatur: id enim natura non sinit: sed potest filium alteri commendare, et alendum dare quasi substituendo.

XXVII. 1 Subjectionis species ignobilissima est, qua

<sup>in exules nullum jus civitati]</sup> Vide infra libro III. tit. xx. § 41.

<sup>Cum nihil ad illum civitas nostra pertineret]</sup> Nicetas Isaaci Angeli rebus libro I. *μη καινόν ει διφή τις τόν αντιπαλον και κολακεύσει ως φίλιον, τόν οικειον εύρισκων πολέμιον.* Non mirum si quis hostem ambiat eique blan-

diatur, qui suos sibi hostes senserit. (Cap. 10).

<sup>Ex contractus formula serviant]</sup> Ægyptiis id olim vetitum. Athenis permissum ad Solonis tempora: is constituit *ἐπι σώμασι μη δαυείχσθαι, corpus pro credito ne obligaretur.* Plutarchus Solone. (pag. 86 D.) Idem lex Pe-

XXV. The State has no authority over exiles. So say the Heraclidæ in Euripides; so the son of Alcibiades in Isocrates.

The association of several peoples, either by themselves or by their heads, is a League: and we shall hereafter treat of such, when we come to obligations by compact.

XXVI. [Next of Subjection by Consent, as a kind of Association.]

Subjection by consent is either private or public. Private subjectio by consent may be manifold, as there are many kinds of [private] government. The noblest species of this is *Arrogatio*, by which a person who is his own master, gives himself into the family of another, to be subject to him, in the same manner that a son of mature age is sub-

quis se dat in servitutem perfectam, ut illi apud Germanos qui novissimo alessæ jactu de libertate contendebant: *Victus voluntariam servitutem adit*, ait Tacitus. Etiam apud Græcos, ut narrat Dion Prussæensis oratione xv. *μύριοι δήπου ἀποδίδονται ἑαυτοὺς ἐλεύθεροι ὄντες, ὥστε δουλεύειν κατὰ συγγραφὴν ἄνυμυροι cum liberi sint, se in servitutem dant, ut* <sup>De Morib. Germ. c. 24. p. 241 n.</sup> *per contractus formula servant.*

2 Est autem servitus perfecta, quæ perpetuas operas debet pro alimentis et aliis, quæ vitæ necessitas exigit: quæ res si ita accipiatur in terminis naturalibus, nihil habet in se nimis acerbatis: nam perpetua ista obligatio compensatur perpetua illa alimentorum certitudine, quam sæpe non habent, qui diurnas operas locant, unde accidit sæpe, quod dixit Eubulus:

Ἐθέλει δ' ἄνευ μισθοῦ παρ' αὐτοῖς καταμένειν  
Ἐπὶ σιτίοις<sup>6</sup>.

Manere apud illos voluit, mercedis carens,  
Victu contentus.

Idem Comicus alibi:

Πολλοὶ φυγόντες δεσπότης, ἐλεύθεροι  
Ὅντες, πάλιν ζητοῦσι τὴν αὐτὴν φάτην.

Qui se fugitivi gesserunt pro liberis:  
Multi recurrunt pristina ad præsepia.

tilia Romæ constituit. [Lex Ægyptia, qua id vetabatur, a Bocchori sancita fuerat, et refertur a DIODORO SICULO, Lib. i. cap. 79. p. 50. Ed. H. Steph. De Lege Pætilia, vide VARRON. De L. Lat. Lib. vi. pag. 82. et LIVIUM, Lib. viii. cap. 28. J. B.]

<sup>4</sup> Nihil habet in se nimis acerbatis]

Vide ea de re egregiam Busbequii dissertationem epist. exoticarum tertia.

<sup>6</sup> Apud ΑΘΗΝÆΥΜ, unde hæc desumpta sunt, est, Ἐπισίτιος. Lib. vi. cap. 12. Duo autem versus sequentes habentur apud ΣΤΟΒÆΥΜ, Serm. 62. J. B.

<sup>7</sup> Pristina ad præsepia] Apud Plan-

ject to a father. But a father cannot give his son to another, in such a manner that the paternal power passes fully to him, and that he should discharge the office of father; for this, nature does not suffer. But he may commend his son to another, and give him to the other to be brought up as an adopted son.

XXVII. 1 The most ignoble species of subjection is that in which a person gives himself into perfect slavery; as those among the Germans who played the last throw of the dice for their own liberty, as Tacitus says. So Dio Prussæensis.

2 That is perfect slavery, when a man gives his whole labour forever for the sustenance and other necessaries of life. If the matter is

Sic in historiis notabat Posidonius Stoicus, <sup>7</sup> multos olim fuisse, qui suæ imbecillitatis conscii, sponte se aliis in servitutem darent: ὅπως παρ' ἐκείνων τυγχάνοντες τῆς εἰς ἀναγκαῖα ἐπιμελείας, αὐτοὶ πάλιν ἀποδιδῶσιν ἐκείνοις δι' αὐτῶν ἄπερ ἂν ὦσιν ὑπερετεῖν δυνατοί. *Ut domini quidem ipsis providerent de necessariis, ipsi vero operam vicissim quam possent præstarent.* Exemplum addunt <sup>8</sup> alii in Mariandynis, qui eandem ob causam servos se fecerint Heracleotarum.

XXVIII. Jus autem vitæ ac necis <sup>9</sup> (de plena et interna justitia loquor) domini in servos non habent: nec quisquam homo hominem jure potest interficere, nisi is capital commiserit. Sed quorundam populorum legibus dominus, quacunq̄ue de causa servum interfecerit, impune fert, ut ubiq̄ue reges, qui liberrimam habent potestatem. Hac comparatione ante nos usus est Seneca: *Si servo quominus in nomen meriti perveniat, necessitas obest, et patiendi ultima timor, idem istud obstat et ei, qui regem habet, et ei qui ducem, quoniam quanquam sub dispari titulo paria in illos licent.* Cum tamen haud dubie servus a domino injuriam possit accipere, ut recte affirmat idem Seneca: sed agendi impunitas impropr-

Lib. III. de Benef. 18.

Lib. III. de Benef. 22.

tum quidam (Casin. II. 4. 14):

Liber si sim, meo periculo vivam, nunc vivo tuo. Melissus Spoletinus Grammaticus manumitti noluit. [Suet. Gramm. c. 21].

<sup>7</sup> Habet hoc ex ATHENÆO, Lib. VI. cap. 18. pag. 263 c. Edit. Casaub. 1667. J. B.

<sup>8</sup> Hoc sequitur statim post verba Posidonii apud ATHENÆUM, loco indicato. Sed Maryandinos vi servire coactos Heracleotis, ait STRABO, Geogr. Lib. XII. pag. 817 A. J. B.

<sup>9</sup> De tota ista materia confer PUFENDORFIUM nostrum, De Jure Nat. et Gent. Lib. VI. cap. 3. et de Offic. Hom. et Civ. Lib. II. cap. 4. J. B.

<sup>10</sup> Patres non minus quam matres fetuum curam gerant] Vide infra cap. VIII. § 18. Plinius x. 34. de Columbis: Amor utriq̄ue sobolis æqualis.

<sup>11</sup> Partus non minus patrem sequetur quam matrem] Seneca de Beneficiis VII. 12. quomodo patri matrique communes liberi sunt? Lex Visigothica

thus taken in natural terms, there is nothing shocking in this; for the perpetual obligation to labour is compensated by the perpetual certainty of food; which often those have not who work for daily wages. See Eubulus; Posidonius.

XXVIII. Masters have not over slaves the power of life and death, (I speak of plenary and internal jurisdiction,) nor can any one lawfully put a man to death, except he have committed a capital offense. But by the laws of some peoples, the master, if for any cause he has killed his slave, meets with impunity, as absolute kings do. Seneca before us had used this comparison. And yet undoubtedly a slave may receive a Wrong from his master, as Seneca also affirms; but impunity is not properly called a Right. The like right Solon gave

jus dicitur. Quale jus et Solon parentibus in liberos concesserat, et veteres Romanorum leges. Sopater: ἔξῃν πατρὶ ὄντι τοὺς παῖδας ἀνελεῖν. ἔξῃστιν ἐὰν ἀμάρτη τι. καὶ ὅτι ὁ νόμος τοῦτο εἰδῶς ὡς εἰλικρινῆς γένοιτ' ἂν δικαστῆς ὁ πατήρ, τοῦτο προσέταξεν. *Licuit ipsi cum pater esset filios interficere: nempe si quid peccatum esset: nam lex id ipsi permisit, ideo quia credidit integrum judicem fore.* Idem jus obtinere παρὰ πολλοῖς καὶ σφόδρα εὐνομουμένοις, *apud multos populos legum gloria florentes*, ait Dion oratione xv.

Sext. Empir.  
Pyrr. 211. c.  
24 § 211.

p. 240 c.

XXIX. 1 De his qui ex servis nascuntur difficilior inspectio est. Romano jure et jure gentium circa captivos, ut dicemus alibi, ut in bestiis, ita in servilis conditionis hominibus partus matrem sequitur: quod tamen juri naturali non satis congruit, ubi pater aliqua ratione sufficiente cognosci potest: nam cum in mutis animantibus <sup>2</sup>patres non minus quam matres fœtum curam gerant, hoc ipso ostenditur fœtum utriusque esse communem. Sic ergo, si lex civilis hac de re tacuisset, <sup>1</sup>partus non minus patrem sequeretur quam matrem. Pona-  
mus ergo, quo minor sit difficultas, utrumque parentem ser-

Lib. x. tit. i. 17. *Si enim filius ab utroque parente gignitur et creatur, cur idem ad conditionem tantum pertineat genitricis, qui sine patre nullatenus potuit procreari?* Deinde: *Hac rationabiliter nature lege compellimur, agnitionem ancille, quæ servo alieno juncta pepererit, inter utrosque dominos æqualiter dividendam.* Slavi et Slavæ proles patrem sequebatur; *Speculum Saxonicum* III. 37. Idem moris in nonnullis Italiæ locis c. licet 3. de conjugio servo-

rum. Apud Langobardos et Saxones sequitur partus partem deterio-  
*Spec. Sax.* i. 16. Idem apud Wisigothos in Hispania Isidori tempore obtinuisse discas ex c. ult. causa xxxii. quæst. iv. Natus ex servo et ingenua eadem Wisigothorum lege fit servus. III. tit. ii. 3. iv. tit. v. 7. ix. tit. 1, 16. Ex servo et ancilla nati inter dominos dividuntur. Si unus sit filius, habet eum servi dominus, ancillæ domino pretii dimidium persolvens. In origi-

parents over children, as did the old Law of Rome. See Sextus Empiricus and Dio.

XXIX. 1 The question concerning those who are born slaves, is more difficult. By the Roman Law, and by the Law of Nations respecting captives, as we shall explain elsewhere, as in beasts, so in men of servile condition, the offspring follows the mother; which however is not sufficiently congruous to Natural Law, when the father may be known by sufficient evidence. For since in dumb animals the father, no less than the mother, shares the care of the offspring, we have, in this, an evidence that the progeny belongs to both. And thus, if the Civil Law had been silent on this point, the progeny would follow the father no less than the mother. Let us suppose then, to

vitutem servire; et videamus, an naturaliter partus servilis futurus sit conditionis. Certe si alia nulla fuerit ratio educandi partum, potuerunt parentes prolem sibi nascituram in servitutem secum addicere: quippe cum tali ex causa etiam in libertate natos vendere parentibus liceat.

2 Sed cum hoc jus naturaliter ortum ducat ex ipsa necessitate, <sup>1</sup>extra eam non est jus parentibus prolem suam cuiquam addicere: quare jus dominorum in prolem servilem hoc casu nascetur, <sup>2</sup>ex ipsa alimentorum et eorum quæ vitæ necessaria sunt præbitione: ac proinde cum diu alendi fuerint et servis nati, antequam opera eorum domino utilis esse possit, et sequentes operæ sui temporis alimentis respondeant: effugere ita natis servitutem non licebit, nisi pro alimentis quantum satis est reddant. Certe si immanis sit domini sævitia, servos illos etiam qui ipsi se in servitutem dederunt, fuga consulere sibi posse probabilis sententia est. Nam quod Apostoli et an-

*Less. v. 5.*  
*dub. 5.*

*1 Cor. vii. 21.*  
*Eph. vi. 5.*  
*Col. iii. 22.*  
*Tit. ii. 9.*  
*1 Pet. ii. 16.*

nariis patris originarii dominus duas fert partes, feminae originariae dominus unam, ex edicto Theodorici apud Casiodorum c. 67. in Anglia Francus quis et aut villanus ex patre: idemque in aliis conditionum discriminibus observatur. Littleton *de Villanagio*, et liber *de laudibus legum Angliæ*. Has leges a civili Romana discrepantes juri naturæ non repugnare agnoscit Thomas Aquinas.

(Suppl. Quæst. 52. Artic. 4. in Conclus.) quid ni, cum et Mensis lege apud Romanos alterutro parente peregrino natus peregrinus censeretur? ut nos docet Ulpianus in Institutionibus, titulo *de his qui in potestate*, v. § 8. [Vide ibi Notas Eruditissimi SCHULTINGII. De Originariis autem, qui iidem sunt ac *Adscriptitii*, consule JAC. GOTHOFRED. ad Lib. v. Tit. ix. *Cod.*

make the difficulty less, that both the parents are in slavery; and let us see whether the offspring would be of servile condition by Natural Law. Certainly if there were no other means of bringing up the offspring, the parents might give their future progeny along with themselves into slavery: since on such grounds, parents may even sell their children.

2 But since this Right by Natural Law flows from necessity only, it is not the right of the parents, in any other case, to give their children into slavery. And therefore the right of the owners over the progeny of slaves arises, in this case, from their supplying sustenance and the other necessaries of life. And thus, when the children born of slaves are to be supported for a long time, and the subsequent labour corresponds to the aliment afterwards supplied, it is not lawful for those thus born to escape slavery.

But if the cruelty of the owner be extreme, it is a probable opinion that even those who have given themselves into slavery may seek refuge in flight. For what the Apostles and the ancient Canons prescribe to slaves, that they are not to withdraw themselves from their masters,

tiqui canones servis edicunt, <sup>7</sup> ne se dominis subtrahant, generale est, et eorum errori oppositum, qui omnem subjectionem tam privatam quam publicam rejiciebant, ut pugnantem cum Christiana libertate.

C. et quia  
Serv. 17. q. 4.

XXX. Præter perfectam servitutem, de qua jam egimus, sunt et imperfectæ, ut quæ aut in diem sint, aut sub conditione, aut ad res certas. Talis est libertorum, statu liberorum, nexorum, addictorum, ascriptorum glebæ, septem annorum servitus apud Hebræos; et altera ad Jubilæum usque: Penestorum apud Thessalos; eorum, quos manus mortuas vocant, ac postremo <sup>8</sup> mercenariorum: quæ discrimina aut a legibus aut a pactionibus pendent. Imperfecta servitus naturaliter etiam esse videtur ejus, qui altero parente liberæ, altero servilis conditionis sit natus, ob eam quam supra diximus causam.

XXXI. Publica subjectio est, qua se populus homini alicui, aut pluribus hominibus, aut etiam populo alteri in ditionem

Theodos. pag. 451. et seqq. Tom. i. J. B.]

<sup>7</sup> *Extra eam non est jus parentibus prolem suam cuiquam addicere*] Ita et Carolus Calvus statuit cap. xxiv. Edicti Pistis.

<sup>8</sup> *Ex ipsa alimentorum et eorum quæ vitæ necessaria sunt præbitione*] Vide Leonem Afrum Lib. vi. de Barca. (Pag.

599. Ed. Elzevir.)

<sup>7</sup> *Ne se dominis subtrahant*] Vide infra Lib. III. c. vii. § 6.

<sup>8</sup> *Mercenariorum*] Inter quos ii, qui in Anglia *apprentisii* dicuntur, durante disciplinæ sus tempore, proxime ac servilem conditionem accedunt. [Vide Thom. Smith, *De Republ. Anglic.* Lib. III. cap. 10. J. B.]

is a general rule only, and delivered in opposition to the error of those who rejected all subjection both private and public, as contrary to Christian liberty.

XXX. Besides complete slavery, of which we have now spoken, there are imperfect kinds of slavery; as those which are for a time; or under a condition; or to perform certain work. Such is the state of *liberti*, freedmen; *status liberorum*<sup>\*</sup>, manumitted by testament under a pendent condition; *nezi*, slaves for debt; *addicti*, slaves by sentence of a judge; *ascripti glebæ*, serfs conveyed with the land; and the slavery among the Hebrews for seven years, and that which lasted till the Jubilee. So the *Penestæ* of Thessaly; so what are called *mortuæ manus*, villein tenants; and finally, mercenaries; which differences depend on law or on compacts. Also by the Natural Law the condition of those, one of whose parents is of free and the other of servile condition, seems to be an imperfect slavery, for the reasons given above.

XXXI. That is public subjection, in which a people gives itself

<sup>\*</sup> I have taken Gronovius's explanations of these various kinds of imperfect slavery. W. W.



dat. Formulam talis subjectionis in exemplo Capuæ supra adduximus. Similis est illa populi Collatini: *Deditisne vos populum Collatinum, urbem, agros, aquam, terminos, delubra, utensilia, divina humanaque omnia in meam populique Romani ditionem? Dedimus. Et ego recipio.* Quo alludens Plautus *Amphitruone* ait (Act. I. Scen. i. vers. 102, 103):

<sup>a</sup>Deduntque se, divina humanaque omnia, urbem, et liberos  
In ditionem atque in arbitratum cuncti Thebano populo.

Persæ hoc vocabant aquam et terram dedere. Sed hæc perfecta subjectio est: sunt et aliæ minus perfectæ, aut habendi modo, aut quoad imperandi plenitudinem, quarum gradus peti possunt ex his, quæ supra a nobis dissertata sunt.

Lib. I. 3.

XXXII. Ex delicto subjectio etiam non accedente consensu nascitur, <sup>b</sup>quoties qui meruit libertatem amittere, ab eo cui pœnæ exigendæ jus est, in potestatem vi redigitur. Cui autem jus sit pœnæ exigendæ, videbimus infra. Possunt autem hunc in modum subijci non singuli tantum privata subjectione: <sup>c</sup>ut Romæ qui ad dilectum non respondebant, et incensi: postea et feminæ, quæ se servo alieno junxissent: sed et populi

Cic. pro Cæc. c. 34.

<sup>a</sup> *Deduntque se, divina humanaque omnia*] Id Persæ vocabant *terram et aquam dedere.*

<sup>b</sup> *Quoties qui meruit libertatem amittere*] Ut socii illi Ulyssis Ægyptios prædati, de quibus Homerus *Odysseæ* ζ. (vers. 271, 272):

<sup>a</sup> Ἐπὶ ἡμέων πολλοὶ μὲν ἀπέκτιστον ὄρεϊ χαλκῷ.

Τούτῃ δ' ἀγαγον ζῶντες, σφίσιον ἐργάζεσθαι ἀνάγκη.

Partem igitur nostrum sicellicibus obruncarunt:

Partem etiam vivos ad opus traxere coactum.

Sic Apollinem Jupiter cum in tartarum

into subjection to one man, or to many, or to another people. We have above given the formula of such a subjection, in the case of Capua. (B. I. c. iii. § viii.) So the formula used in the case of the Collatine people: See Livy: to which Plautus alludes. The Persians call this presenting earth and water. There are other modes of public subjection less perfect, either as to the mode of possessing such subjects, or as to the plenitude of authority; the degrees of which may be sought in what we have said above (B. I. c. iii.).

XXXII. Subjection from delict or delinquency, may arise without preceding consent, when he who has deserved to lose his liberty is reduced by force into the power of him who has a right to punish him. Who has the right to punish, we shall hereafter see. (B. II. c. xx. § iii.) And in this way, not only may individuals be reduced into private subjection; (as at Rome those who did not appear to answer to a charge of delict, and those who had made a false return of their property; and afterwards, women who had married the slave

publica ex publico delicto. Hoc interest, quod populi servitus per se perpetua est, quia successio partium non impedit, quo minus unus sit populus. At singulorum servitus pœnalis personas non egreditur; quia noxa caput sequitur. Utraque autem servitus, tam privata, quam publica, pœnalis esse potest, aut perfecta aut imperfecta pro modo meriti et inflictæ pœnæ.

De servitute vero, tam privata, quam publica, quæ ex jure gentium oritur voluntario, infra dicendi erit locus, ubi ad effectus belli erit ventum.

de jicere vellet, exoratus a Latona servituti addit: habet Apollodorus libro III. (c. 10. § 3).

<sup>c</sup> *Ut Romæ qui ad dilectum non respondebant*] Apud Lycios fures. Ni-

colaus Damascenus. (pag. 517. Excerpt. Peiresc.) Apud Wisigothos multi aliorum criminum damnati, ut ex eorum legibus apparet.

---

of another master;) but also peoples might be reduced into public subjection for a public delict. There is this difference, that the slavery of a people is of itself perpetual, because the succession of parts does not prevent its continuing to be one people. But the slavery of individuals does not go beyond the person; because the consequences of the crime follow the criminal. But both kinds of slavery, public and private, may be penal, whether it be perfect or imperfect, according to the nature of the crime and the punishment.

Of the slavery both private and public which arises from the instituted Law of Nations, we shall have an opportunity of speaking hereafter, when we come to the effects of war. (B. III. c. vii.)

---

## CAPUT VI.

### DE ACQUISITIONE DERIVATIVA FACTO HOMINIS, UBI DE ALIENATIONE IMPERII, ET RERUM IMPERII.

- |   |   |
|---|---|
| <p>I. <i>Ut alienatio fiat, quid requiratur in dante:</i></p> <p>II. <i>Quid in accipiente.</i></p> <p>III. <i>Imperia alienari posse interdum a rege, interdum a populo.</i></p> <p>IV. <i>Imperium in partem populi alienari parte invita a populo non posse.</i></p> <p>V. <i>Nec ipsam partem in se imperium posse alienare, nisi in summa necessitate.</i></p> <p>VI. <i>Causa diversitatis.</i></p> <p>VII. <i>Imperium in locum posse alienari.</i></p> <p>VIII. <i>Rejicitur sententia, statuens ob utilitatem aut necessitatem recte a rege imperii partes alienari.</i></p> | <p>IX. <i>Infeudationem et oppignorationem sub alienatione contineri.</i></p> <p>X. <i>Etiam ad alienandas jurisdictiones minores requiri populi consensum, aut specialem, aut per consuetudinem.</i></p> <p>XI. <i>Patrimonium populi a regibus alienari non posse.</i></p> <p>XII. <i>Distinguendas res, quae in fructu sunt patrimonii, a rebus patrimonii.</i></p> <p>XIII. <i>Partes patrimonii oppignorari a regibus quatenus possint, et cur?</i></p> <p>XIV. <i>Testamentum alienationis esse speciem et juris naturalis.</i></p> |
|---|---|

I. 1 **A**CQUISITIONE derivativa nostrum fit aliquid facto hominis aut legis. Homines rerum domini, ut dominium, aut totum, aut ex parte <sup>1</sup>transferre possint, juris est naturalis post introductum dominium: inest enim hoc in ipsa domini, pleni scilicet, natura. Itaque Aristoteles: *ὁρος τοῦ οἰκεῖον εἶναι, ὅταν ἐφ' αὐτῶ ἢ ἀπαλλοτριῶσαι proprietatis definitio est, ubi penes nos est jus alienandi.* Duo

<sup>1</sup> Rhet. v.

<sup>1</sup> Confer, in hanc rem, PUFENDORFIUM nostrum, *De Jure Nat. et Gentium*, Lib. iv. cap. 9. J. B.

---

#### CHAPTER VI. *Of acquisition derivative, by the act of man; and herein of the alienation of the Sovereignty, and of its accompaniments.*

I. 1 Things become ours by derivative acquisition, by the act of man, or by the act of the law. That those who are the owners of things may transfer the ownership, either the whole or in part, is a part of Natural Law, when ownership has been introduced: for this is a part of the nature of plenary ownership. So Aristotle.

But two things are to be noticed; one, in the giver, one, in the

tamen notanda sunt, alterum in dante, alterum in eo, cui datur. In dante, non sufficere actum internum voluntatis, sed simul requiri aut verba, aut alia signa externa: quia actus internus, ut alibi diximus, non est congruens naturæ societatis humanæ. Soto iv. q. 5. a. 1.

2 Ut vero traditio etiam requiratur, ex lege est civili: quæ, quia a multis gentibus recepta est, jus gentium improprie dicitur. Sic alicubi usurpatum videmus, ut professio apud populum, aut magistratum, et relatio in acta requiratur; quæ omnia ex jure esse civili certissimum est. Actus autem voluntatis, quæ signo exprimitur, intelligi debet <sup>a</sup> voluntatis rationalis. Leg. ii. 3. dub. 3.

II. Vicissim in eo, cui res datur, seposita lege civili, requiritur naturaliter voluntas accipiendi, cum suo signo: quæ voluntas ordinarie sequitur dationem, sed potest et præcedere, puta si quis quid dari, aut concedi sibi petierat: censetur enim durare voluntas, nisi mutatio appareat. Cetera quæ tum ad juris concessionem, tum ad acceptionem requiruntur, et quomodo fieri utrumque possit, infra in capite de promissis tractabimus: nam in hoc <sup>b</sup> alienandi et promittendi par est ratio, jure quidem naturali.

<sup>a</sup> *Voluntatis rationalis*] Cassiodorus, ii. 11. *Alienatio rerum solidum desiderat habere judicium.*  
<sup>b</sup> *Alienandi et promittendi par est*

receiver. In the giver an internal act of the will does not suffice; but there are required besides, either words or external acts; because a mere internal act, as we have said elsewhere, is not congruous to the nature of human society.

2 That tradition (delivery) also is required, is a matter of Civil Law; which, because it is received by many nations, is improperly called a part of *Jus Gentium*. So in other places we find the usage to be, that a declaration before the people or the magistrate, or a registry of the gift, is required; which it is quite certain are matters of the Civil Law.

An act of the will expressed by a sign must be understood to mean, of a rational will.

II. On\* the other side, in him to whom the thing is given, there is required, setting aside the Civil Law, by Natural Law, the will of accepting, with its sign: which will ordinarily follow the giving; but may precede it; as for instance if the receiver had asked that the thing be given, or granted: for such a will is supposed to continue to exist, except some change appear.

\* See *E. M.* 699.

III. Sicut autem res aliæ, ita et imperia alienari <sup>2</sup>possunt ab eo, cujus in dominio vere sunt, id est, ut supra ostendimus, a rege, si imperium in patrimonio habeat: alioquin <sup>c</sup>a populo, sed accedente regis consensu; quia is quoque jus aliquod habet, quale usufructuarius, quod invito auferri non debet. Et hæc quidem procedunt de toto imperio summo.

IV. In partis alienatione aliud insuper requiritur, <sup>d</sup>ut etiam pars, de qua alienanda agitur, consentiat. Nam qui in civitatem coeunt, societatem quandam contrahunt perpetuam et immortalē, ratione partium, quæ integrantes dicuntur: unde sequitur has partes non ita esse sub corpore, ut sunt partes corporis naturalis, quæ sine corporis vita vivere non possunt, et ideo in usum corporis recte abscinduntur. Hoc enim corpus, de quo agimus, alterius est generis, voluntate contractum scilicet; ac propterea jus ejus in partes ex primæva vo-

ratio] Ideoque etiam dona absentibus per internuntios mitti possunt, ut Servius notat ad illud IX. *Æneidos*, Cum jungeret absens. (vers. 361.)

<sup>b</sup> Vide PUFENDORF. Lib. VIII. cap. 5. § 9. et seqq. J. B.

<sup>c</sup> *A populo*] Bal. et Oldradus in c. intellecto. de jurejurando. Idem Baldus cons. 327. n. 7. Cardinalis Thuschus p. p. concl. 40. n. 1. et concl. 694. Exempla apud Harsæum tomo II. in anno 1510 xxvi. et Guicciardinum libro

xvi.

<sup>d</sup> *Ut etiam pars, de qua alienanda agitur, consentiat*] Gall. II. de pace publica, c. xv. n. 14. vide Serranum in Carolo Sapiente, (Pag. 194. Ed. Paris. 1627) et eundem in Francisco I. ubi de Burgundia sermo. (Pag. 565.)

<sup>e</sup> *Nisi evidenter se aliter servare non possit*] Confer quæ infra hoc libro c. xxiv. § 6. Hac de causa absolutus a Spartanis Anaxilæus, qui Byzantium fame cogente dederat. Xenophon

The other things which are required for the conveyance of a right and for acceptance of it, and how each may be done, we shall treat of below, in the Chapter on Promises: for the right of alienating and of promising are the same, at least by Natural Law.

III. As other things may be alienated, so may Sovereign authority, by him who is really the owner, that is, as we have said above (I. iii. § xii.), by the king, if the authority is patrimonial: otherwise, by the people, but with the consent of the king; because he too has his right, as tenant for life, which is not to be taken away against his will. And so much of the whole sovereign authority.

IV. In the alienation of a part of the sovereignty, it is also required that the part which is to be alienated consent to the act. For those who unite to form a State, contract a certain perpetual and immortal society, in virtue of their being integrant parts of the same; whence it follows that these parts are not under the body in such a way as the parts of a natural body, which cannot live without

luntate metiendum est, quæ minime credi debet talis fuisse, ut jus esset corpori partes et abscindere a se, et alii in ditio- nem dare.

V. Sic vicissim parti jus non est a corpore recedere, nisi evidenter se aliter servare non possit: nam, ut supra diximus, in omnibus iis, quæ humani sunt instituti, excepta videtur necessitas summa, quæ rem reducit ad merum jus naturæ. Augustinus, *De Civit. Dei*, Lib. XVIII: *In omnibus* Cap. 2. *fere gentibus quodammodo vox naturæ ista personuit, ut subjugari victoribus mallent, quibus contigit vinci, quam bellica omnifaria vastatione deleri.* Itaque in juramento Græcorum, quo Græci qui se Persis subjecissent devovebantur, Herod. vii. 132. additum fuit, *μη ἀναγκασθέντες· nisi plane coacti.*

VI. Atque hinc satis intelligi potest, cur hac in re majus sit jus partis ad se tuendam, quam corporis in partem: quia

*Historiæ Græcæ* I. (c. 3. § 12.) Anastasius Imperator etiam gratias agit præfectis, qui Martyropolim Persis dederant, quia defendi nequibat. Procop. *περι κτισμάτων.* (Lib. III. c. 2.) Idem Procopius IV. *Gothicorum*: λιμῶ γὰρ οὐκ οἶδεν ἢ ἀπερὶ συνοικίεσθαι, κεινὴν τε καὶ ἀνδραγαθίζεσθαι οὐκ ἀνεχόμενης τῆς φύσεως· *cum fame habitare virtus recusat, nec fert natura, ut iidem et esuriant et agant fortiter.* (Cap. 23.) Et apud Annam Comnenam libro v.

epistola Cephalaë de Larissa obsessa ad Imperatorem Alexium: ἀνάγκη δουλεύοντες (καὶ τί γὰρ δεῖ πρὸς φύσιν καὶ τὴν ἐκ ταύτης τυραννίδα ποιεῖν;) γνώμην ἔχομεν τὸ φρούριον παραδῶναι τοῖς ἐγκειμένοις καὶ φανερώς ἀποκλίγουσιν· *Necessitati servientes (quid enim contra vim naturæ agi potest?) constituimus oppidum tradere iis, qui nos non obsident tantum, sed, quod manifestissimum est, strangulant.* (Cap. 4.)

the life of the body, and therefore may rightly be cut away for the utility of the body. The body of which we speak is of another kind, namely a voluntary combination. And thus its right over its parts is to be measured by its primeval will; and this must not be supposed to have been such that the body should have the right of cutting off parts from itself, and giving them into the authority of another.

V. And in like manner on the other hand, a part has not a right to withdraw from the body, except evidently it cannot otherwise preserve itself: for, as we have said, in every thing of human institution the case of extreme necessity is to be excepted, which reduces the matter to more Natural Law. So Augustine. So in the oath of the Greeks, in which those who had submitted to the Persians were devoted to severe punishment, with the reservation, *Except they had been plainly compelled.*

VI. And hence it may be sufficiently understood, why, in this matter, the part has a greater right to protect itself than the body has

pars utitur jure <sup>3</sup>quod ante societatem initam habuit, corpus non item. Nec dicat mihi aliquis, imperium esse in corpore tanquam in subjecto, ac proinde alienari ab eo posse ut dominium. Est enim in corpore, ut subjecto adæquato, non divisibiliter in plura corpora, sicut anima est in corporibus perfectis. Necessitas autem, quæ ad jus naturæ rem reducit, hic locum habere non potest; quia in eo jure naturæ usus quidem comprehendebatur, ut esus, detentio, quæ sunt naturalia, at non alienandi jus, quod factio humano introductum est, atque ideo inde mensuram accipit.

VII. At imperium in locum, id est, pars territorii, puta non habitata aut deserta, quo minus a populo libero alienari possit, aut etiam a rege, accedente populi consensu, quid obstet, non video: nam populi pars, quia liberam habet voluntatem, jus quoque habet contradicendi: at territorium, et totum, et ejus partes sunt communia populi pro indiviso, ac proinde sub arbitrio populi. At imperium in populi partem si alienare populo non licet, ut jam diximus, multo minus regi

<sup>3</sup> Argumentum istud, ut et sequens, nititur rationibus non minus falsis, quam subtilibus: ut ostendimus in Notis nostris Gallicis. Omnino potest Civitas,

summa necessitate urgente, partem aliquam, non quidem alienare, ipsa invita, sed deserere, ita tamen ut sinat eam, si possit, suis ipsius viribus sese tueri et

---

over a part\*; because the part uses a right which it had before the society was formed, and the body does not. Nor must any one say to me that the sovereignty resides in the body as an attribute in its subject, and therefore may be alienated by it as ownership may. For it resides in the body as in an adequate subject, not divisible into several bodies, as the soul or life resides in perfect bodies. But the necessity which reduces the thing to Natural Law cannot have place with regard to the body: for in Natural Law, some things are comprehended, as consuming a thing by eating, and retaining possession of a thing, which are natural operations; but not alienation, which is introduced by the act of man, and takes its measure from that.

VII. But sovereignty over a locality, that is, a part of the territory, say an uninhabited or deserted part, may, so far as I see, be alienated by a free people, or by the king with the consent of the people. For a part of the people, because it has free will, has also the right of refusing consent; but the territory, both the whole and its parts, are

<sup>4</sup> Gronovius, in his Notes, is very impatient of this discussion of Grotius, and says that it tends to make the claims to kingdoms eternal: as when the French deny that Francis the First, as a captive, could cede to Charles the Fifth the kingdom of Naples, the dukedom of Savoy, and the Belgian provinces.

imperium etsi plenum habenti, attamen non plene, ut supra distinximus.

VIII. Quare subscribere non possumus jurisconsultis, qui ad regulam de non alienandis imperii partibus adjiciunt exceptiones duas, de publica utilitate, et de necessitate: nisi hoc sensu, ut ubi eadem est utilitas communis, et corporis, et partis, facile ex silentio etiam non longi temporis, consensus et populi, et partis intervenisse videatur, facilius vero si etiam necessitas appareat. At ubi manifesta est in contrarium voluntas, aut corporis, aut partis, nihil actum debet intelligi, nisi, ut diximus, ubi pars a corpore coacta est abscedere.

IX. Sub alienatione merito comprehenditur et infeudatio, sub onere commissi ex felonia aut deficiente familia. Nam et hæc est conditionalis alienatio. Quare videmus a pluribus populis irritas habitas ut alienationes, ita infeudationes regnorum, quas populis inconsultis reges fecerant. Populum autem consensisse intelligimus, sive totus coit, quod

defendere. Hac ratione æquale jus est utrimque, ut esse debet. Sed fusius id omne exposuimus in dictis Notis. J. B.

[*Irritas habitas ut alienationes, ita infeudationes*] Et remissiones homagii. Vide Cromerum *Polonicorum* xxv.

Belluga in  
Pr. Spec. in  
Rub. 8 p. 3.  
et 4. Roch.  
de Curt. de  
Cons. q. 8.  
col. 6. Tom.  
1. et alii  
alleg. a Vasq.  
l. 4.

Smith, de  
Rep. Ang. l. 9.  
Buch. in  
Bailolo.  
Fross. l. 214.  
et 246.  
Monstrel. in  
Hist. c. 29, &  
Guicci. lib.  
xvi.

common to the people, *pro indiviso*, as a whole, and therefore subject to its will. But if a people cannot alienate the sovereignty of a part of the people, as we have said, much less can a king, though having full sovereignty, but not in a full manner, according to the distinction explained above.

VIII. Wherefore we cannot agree with jurists who, to the rule of not alienating the parts of the empire, add two exceptions, public utility, and necessity; except in this sense, that when the common utility of the body and of the part is the same, the consent both of the people and of the part may seem, even by a silence of no long time, to be given; and more easily still, if necessity appear. But when the will, either of the body or of a part, is manifestly on the contrary side, nothing ought to be understood as done, except, as we have said, when a part is compelled to secede from the body.

IX. Under alienation is rightly comprehended also *infeudation*, giving the kingdom as a fief to a superior, with the power of taking possession of it if the holder commit felony, or if his family fail\*. And hence we see that by most peoples, infeudations, as well as alienations, are held void when made by the kings without consulting

\* As king John of England executed an infeudation of his kingdom to the Pope. *Gronov.*



olim apud Germanos et Gallos fieri solebat, sive per legatos partium integrantium mandatu sufficiente instructos. <sup>3</sup>Nam facimus et quod per alium facimus. Sed nec pignori dari pars imperii poterit, nisi consensu simili: non ea tantum ex causa, quod ex pignoris datione sequi alienatio solet, sed quod et rex teneatur populo ad exercendum per se summum imperium, et populus partibus suis ad conservandum hoc exercitium in sua integritate, cujus rei gratia in societatem civilem coitum est.

X. Minores vero functiones civiles quo minus populus etiam jure hereditario possit concedere nihil obstat, cum ea corporis summique imperii integritatem nihil imminuant. Inconsulto vero populo rex id non potest, si maneamus intra terminos naturales: quia juris temporarii, quale est regum electorum, aut lege succedentium ad imperium, <sup>4</sup>effectus nisi pariter temporarii esse non possunt. Potuit tamen populi

Cravet. Cons.  
294. num. 2.  
Zoannet. de  
Rom. Imp.  
n. 162.

<sup>3</sup> Nam facimus et quod per alium facimus] Sic in Imperio Germanico in alienationibus Electorum consensus ex more et pactis pro consensu est ordinum. [De eo non adsentiuntur Recentiores et optimi Scriptores, qui Jus Publicum Germanicum exponunt. J. B.

<sup>4</sup> Ratio ista non usquequaque vera est. In eo res vertitur, an Populi consensus heic juste præsumi queat. Sed

de hoc diximus in Notis Gallicis ad hunc locum. J. B.

<sup>b</sup> *Oppida aut regiones totas*] Ut a Dario Sylosonti urbem et insulam Samiorum. [Exemplum istud non quadrat. Darius expulit tantum Mæandrium, qui regnum occupaverat, excluso Sylosonte, Polycratis fratre. Vide HERODOTUM, Lib. III. cap. 139. et seqq. Sed idem Darius principibus viris, quos secum ex

the people. The consent of the people is understood to be given, whether it meet as a whole, which was formerly the usage among the Germans and Gauls, or by certain representatives of the integrant parts, invested with sufficient powers. For what we do by others we do ourselves. Nor can a part of the empire be *oppignered* or put in pawn, except with similar consent; not only because oppigneration is commonly followed by alienation, but also, because the king is bound to the people to exercise the sovereign authority himself, and the people is bound to its parts to preserve this exercise in its integrity; for which purpose the members of the civil society came together.

X. To concede subordinate civil functions to persons, even with the right of hereditary succession, is what a people may do; since such concessions do not trench upon the integrity of the body politic and the sovereignty. But the king cannot do this without consulting the people, if we confine ourselves within the limits of Natural Law: for a temporary right, such as that of an elective or hereditary king, can only have temporary effects. But this right may be given to kings,

ut expressus consensus, ita tacitus consuetudine introductus, qualem nunc passim vigere cernimus, id jus regibus tribuere. Eo jure usos olim reges Medos et Persas, <sup>b</sup> oppida aut regiones totas perpetuo jure tenendas donasse, passim in historiis legimus.

XI. <sup>1</sup> Patrimonium quoque populi, cujus fructus destinati sunt ad sustentanda reipublicæ aut regiæ dignitatis onera, <sup>5k</sup> a regibus alienari, nec in totum, nec in partem potest. Nam et in hoc jus majus fructuario non habent. Nec admitto exceptionem, si res modicum valeat, quia quod meum non est, ejus nec exiguam partem alienare mihi jus est: sed in rebus modicis, quam in magnis, consensus populi ex scientia et ex silentio facilius præsumitur. Quo sensu et ad res patrimonii publici aptari possunt, quæ de necessitate et utilitate publica, in alienandis imperii partibus, supra diximus, tantoque magis, quia momenti minoris res hic vertitur. Est enim patrimonium imperii causa constitutum.

Jonia et Æolide duxerat, *singulis ipsarum urbium*, quibus eos præfecerat, *perpetua dedit imperia*, referente CORN. NEPOTE, *Themist.* c. 10. *J. B.*]

<sup>1</sup> *Patrimonium quoque populi, cujus fructus sunt destinati ad sustentanda reipublicæ aut regiæ dignitatis onera*] Veteres Græci *τεμνίον* vocabant partem agri publici concessam regibus. Exemplum habes apud Homerum de Bel-

lerophonte apud Lycios *Iliados* ζ. (vers. 194) de Meleagro *Iliados* ι. (vers. 573) de Glauco Lycio *Iliados* μ. ubi scholiastas vide. (vers. 313.)

<sup>5</sup> Confer PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. VIII. cap. 5. § 8. et 11. *J. B.*

<sup>k</sup> *A regibus*] Sine ordinum consensu. Exemplum apud Thuanum libro LXIII. in anno CLO CLXXXVII.

Alberic. in c. *Intellect. de Jurejur.*  
Bart. in l. 3. § 4. *D. quod vi. Corset in fr. de Excol. Reg. q. 4.*  
Lass. all. a *Vaq. c. 5.*  
Natta *Cons. 367.* Bonif. *Reg. cons. 49. n. 43.*

not only by express consent, but by tacit assent introduced by usage, such as we now see commonly prevail. And so we perpetually read in history of the Median and Persian kings giving towns or provinces as possessions to be held for ever.

XI. The patrimony of a people, the produce of which is destined to support the burthens of the republic or of the royal dignity, may not be alienated by kings, neither in the whole nor in part. For in this too they have only a life interest. Nor do I admit the exception, If it be a thing of small amount; for of what is not mine, I may not alienate even a small part. But in things of small amount, the consent of the people may be presumed from its knowledge and silence, rather than in great matters. In which sense we may also apply what we have said above on the subject of alienating the parts of the sovereignty, to the case of the public patrimony; and the more, inasmuch as a matter of smaller amount is here involved: for the patrimony is constituted [not on its own account but] for the sake of the State.

XII. Sed in eo falluntur multi, quod res, quæ in fructu sunt patrimonii, cum rebus patrimonii confundant. Sic jus alluvionum in patrimonio esse solet, ipsæ res quas fecit alluvio in fructu: jus vectigalia exigendi in patrimonio, pecunia ex vectigalibus procedens in fructu: jus confiscandi in patrimonio, fundi confiscati in fructu.

XIII. Partes autem patrimonii pignori opponi ex causa possunt a regibus, qui plenum habent imperium, id est, qui jus habent ex causa tributa nova indicendi. Nam sicut populus tributa ex causa indicta solvere tenetur, ita et rem ex causa pignori oppositam luere. Luitio enim ista tributi quædam est species. Est autem populi patrimonium regi, pro debitis populi, pignoris jure obligatum. Potest autem pignori dari etiam res mihi pignorata. Quæ autem dicta sunt a nobis hactenus, ita locum habent nisi lex imperio addita, aut regis, aut populi potestatem magis aut auxerit aut contraxerit.

XIV. 1 Illud quoque sciendum est, cum de alienatione agimus, sub eo genere nobis etiam testamentum comprehendi.

\* Confer quæ diximus ad PUFENDORPIUM nostrum, *De Jure Nat. et Gent.* Lib. IV. cap. 10. præsertim in altera Editione. *J. B.*

<sup>1</sup> *Gen.* xv. 2] Habes apud Sophoclem *Trachiniis* (vera. 1164) testamentum Herculis, apud Euripidem *Alcestidis*, (*Alc.* 282. et seqq.) et apud Homerum

*Odyssee* p. (vera. 79) Telemachi donationem mortis causa, quæ et ipsa testamentum quoddam est. Est apud Homerum etiam voluntas ultima de rebus agendis, ut ex *Andromaches* et *Penelopes* verbis ostendit *Plutarchus*. [*De Poësi Homer.* p. 74. Ed. Barnea.] Alia veterum testamentorum exempla

XII. But many persons run into error by confounding the annual income of the patrimony with the patrimony itself. Thus the right to alluvial accession generally belongs to the patrimony; the things alluvially added are part of income; the right of receiving the taxes is in the patrimony; the annual produce of the taxes is income; the right of confiscation is in the patrimony; the property confiscated is income.

XIII. But the parts of the patrimony may be oppignorated, for cause arising, by kings who have plenary sovereignty; that is who have the right, for cause arising, of imposing new taxes. As the people is bound to pay taxes imposed for good cause, so is it to loose a thing pawned for good cause: for such loosing of a thing pawned is a sort of tax. And the patrimony of the people is [in this case] pledged to the king for the debts of the people. And I may oppignorate things pledged to me.

What we have hitherto said holds, except there be a law, besides

Quamquam enim testamentum, ut actus alii, formam certam accipere possit a jure civili, ipsa tamen ejus substantia cognata est dominio, et eo dato juris naturalis. <sup>Arist. ii. Pol. vil.</sup> 'Possum enim rem meam alienare non pure modo, sed et sub conditione; nec tantum irrevocabiliter, sed et revocabiliter, atque etiam retenta interim possessione et plenissimo fruendi jure. Alienatio autem in mortis eventum, ante eam revocabilis, retento interim jure possidendi ac fruendi, est testamentum. Vidit hoc recte Plutarchus, qui cum a Solone dixisset permissam civibus testamenti factionem, addit: τὰ χρήματα, κτήματα τῶν ἐχόντων ἐποίησεν effectit, ut res cuique suæ propriæ et in pleno dominio essent. <sup>Vit. Solon. p. 80 A. Decl. 308.</sup> Quintilianus pater in declamatione: <sup>Decl. 308. init.</sup> *Potest grave videri etiam ipsum patrimonium, si non integram legem habet, et cum omne jus nobis in id permittatur viventibus, auferatur morientibus.* Hoc jure Abrahamus, si sine liberis decessisset, res suas Eliezero relicturus fuerat, ut indicat locus <sup>1</sup>Gen. xv. 2.

## 2 Quod vero alicubi externis testamentum facere non

attulimus supra libro i. cap. 3. § 12. in textu et annotatis. Hebræis usitata testamenta apparet Dent. xxi. 16: Sirachida capite xxxiii. 25. [In testamento Herculis et Alcestidis, quod vocat Auctor noster, nil de bonis statutur: sed tantum mandata quædam dantur. At

est donatio quædam mortis causa, in *Alcestide* EURIPIDIS; non quidem ab ipsa *Alcestide* facta, sed ab Hercule, vers. 1020. et seqq. quam etiam Auctor pro exemplo adfert, in *Spartione* *Florum ad Jus Justinian.* pag. 36. unde forte orta confusio. *J. B.*]

the general condition of sovereignty, either enlarging or contracting the authority of the people or of the king.

XIV. 1 Also we must observe that when we speak of alienation, we include, in that class of processes, testamentary dispositions. For though a testament, like other acts, may assume a certain form by the Civil Law; yet its substance has a close affinity with ownership, and thus, is under Natural Law. For I may alienate my possession, not only simply, but also under condition; not only irrevocably, but revocably, and even retaining in the mean time possession and the fullest power of enjoying it. But alienation under condition, namely the condition of my death, and revocable before that event, while I retain possession and enjoyment in the mean time, is a Testament. So Plutarch, speaking of Solon's granting the Athenians permission to make a will, adds, in order that every one might have full ownership over his own property. So Quintilian. So Abraham if he had died without children, would have left his property to Eliezer. Gen. xv. 2.

2 The law that in some places strangers are not allowed to make

conceditur, id non est ex jure gentium, sed ex jure proprio illius civitatis, et, ni fallor, ab illa veniens ætate, qua externi quasi pro hostibus habebantur: itaque apud moratiores populos merito exolevit.

---

Wills, is not a part of *Jus gentium*, but of the peculiar law of such States; and if I am not mistaken, proceeding from that period when strangers were looked upon as enemies; and therefore it has deservedly fallen into disuse among the most civilized nations.

---

## CAPUT VII.

### DE ACQUISITIONE DERIVATIVA, QUÆ FIT PER LEGEM, UBI DE SUCCESSIONIBUS AB INTESTATO.

- |   |   |
|---|---|
| <p>I. <i>Leges civiles quasdam injustas esse, ac proinde dominium non transferre, ut quæ naufragorum bona fisco addicunt.</i></p>                     | <p>XIV. <i>Regnum ex populi consensu hereditarium in dubio individuum esse.</i></p>   |
| <p>II. <i>Leges naturæ rem accquiri ei, qui alienum accepit ad debiti sui consecutionem: quod quando locum habeat.</i></p>                            | <p>XV. <i>Non durare ultra posteros primi regis.</i></p>  |
| <p>III. <i>Origo successionis ab intestato quomodo a natura.</i></p>  | <p>XVI. <i>Non pertinere ad liberos naturales tantum.</i></p>   |
| <p>IV. <i>An aliquid de bonis parentum liberis debeatur jure naturæ, per distinctionem explicatur.</i></p>  | <p>XVII. <i>In eo mares præferri feminis in eodem gradu.</i></p>  |
| <p>V. <i>In successione liberos defuncti parentibus præferri, et cur.</i></p>   | <p>XVIII. <i>Inter mares præferri natus maximum.</i></p>  |
| <p>VI. <i>Origo vicariæ successionis, quæ representatio dicitur.</i></p>  | <p>XIX. <i>An tale regnum pars sit hereditatis.</i></p>   |
| <p>VII. <i>De abdicatione et exheredatione.</i></p>   | <p>XX. <i>Præsumi in regno talem successionem institutam, qualis in aliis rebus in usu erat tempore regni inchoati: sive regnum fuerit allodiale:</i></p> |
| <p>VIII. <i>De jure liberorum naturalium.</i></p>   | <p>XXI. <i>Sive feudale.</i></p>  |
| <p>IX. <i>Liberis deficientibus, ubi nec testamentum, nec lex certa existant, bona avita deferenda his, a quibus venerunt, aut eorum liberis.</i></p> | <p>XXII. <i>Successio linealis cognatica quæ sit, et qualis in ea transmissio juris.</i></p>  |
| <p>X. <i>Bona noviter quæsitæ proximis.</i></p>   | <p>XXIII. <i>Successio linealis agnatica qualis.</i></p>  |
| <p>XI. <i>Legum circa successiones diversitas.</i></p>  | <p>XXIV. <i>Successio qua semper respicitur proximitas ad primum regem.</i></p>   |
| <p>XII. <i>In regnis patrimonialibus qualis sit successio.</i></p>  | <p>XXV. <i>An exheredari possit filius, ne in regnum succedat.</i></p>  |
| <p>XIII. <i>Si ea regna sint individua, præferri maximum natus.</i></p>   | <p>XXVI. <i>An abdicare quis regnum possit pro se et pro liberis.</i></p>   |
|   | <p>XXVII. <i>Judicium proprie dictum de successione, nec regis esse, nec populi.</i></p>  |
|   | <p>XXVIII. <i>Filium, qui ante patris regnum natus est, post nato præferendum.</i></p>  |
|   | <p>XXIX. <i>Nisi alia lege delatum regnum appareat.</i></p>   |

- XXX. *An nepos ex filio prioris filio posteriori præferatur, per distinctionem explicatur.*
- XXXI. *Item an minor frater superstes regis majoris fratris filio præferendus sit.*
- XXXII. *An fratris filius regis patruo præferatur.*
- XXXIII. *An nepos ex filio præferatur filiae regis.*
- XXXIV. *An minor nepos ex filio nepoti majori ex filia.*
- XXXV. *An nepotus ex majoris filio præferatur filio minori.*
- XXXVI. *An filius sororis præferendus filiae fratris.*
- XXXVII. *An filia fratris majoris fratri minori.*

I. **L**EGE quæ fit acquisitio derivativa, sive alienatio, fit aut lege naturæ, aut lege gentium voluntaria, aut lege civili. De lege civili non agimus, id enim infinitum foret, et præcipuè de bellis controversiæ ex lege civili non definiuntur. Tantum notandum est <sup>a</sup>leges quasdam civiles esse plane injustas, ut quæ bona naufragorum fisco addicunt. Nulla enim

*Aud. Navar.  
post leg. 18.  
C. de Furt.*

<sup>a</sup> *Leges quasdam civiles*] Ut olim apud Anglos, Armoricos, Siculos. Veteris talis legis in Græcia mentio apud Sopatrum et Syrianum in Hermogenem. (*Elis ordereis*, pag. 107. *Ed. Venet.* 1509.) Christianus rex Daniæ, lege de naufragorum bonis confiscandis abrogata, dicebat sibi perisse annua c. aureorum millia; meminit et Brigitta mali hujus moris VIII. 6. et *Speculum Saxonicum* II. 29, de Dania agens, et c. Excommunicationis, de raptoribus. Tum vero Crantzii *Vandalicorum* XIII. 40. XIV. 1: Cromerus *Polonicorum* XXI. (pag. 509. *Ed. Basil.* 1555.)

<sup>b</sup> *Spoliare quod genus est nefas*] Adde I. nequid 7. D. de incendio, ruina, naufragio. Nicetas Choniates in Andronici imperio vocat *ἔθως ἀλογύτατον*, (Lib. II. cap. 3): vide et Cassio-

dorum IV. 7. Quid in mentem venit Bodino, ut talia defenderet? idem scilicet qui Papinianum reprehendit, quod mori quam conscientiam ledere maluerit. [At vero Bodinus occupationem bonorum naufragio amissorum, vocat *barbarum* quid, et *crudelitatem tum in cives, tum in peregrinos*, Lib. I. cap. 10. *de Republ.* Edit. Latin. Francof. 1622, ubi hæc addit: *Jus quaris? Error jus facit: at si non peccatur errore, sed scientia, scelus est, quod erroris specie præterditur.* Pag. 267. Quod spectat Papinianum, ait Bodinus, illum *Jctum fortiter magis, quam sapienter, egisse: qua de causa ita statuat, videre poteris* Lib. III. c. 4. pag. 458, 459. *J. B.*]

<sup>1</sup> Ejeci hinc voces istas, [*id quod meum nondum est, sed mihi dari debet, aut*] quæ, quamquam in omnibus Edd.

CHAPTER VII. *Of the derivative acquisition which takes place by Law; and herein of succession to intestate property.*

I. The derivative acquisition or alienation which takes place by Law, takes place either by the Law of Nature, or by the instituted Law of Nations, or by the Civil Law. Of the Civil Law we do not treat, for to do so would be an infinite task; and the principal controversies concerning war are not defined by the Civil Law. Only this we may note, that some civil laws are manifestly unjust: as those which confiscate goods thrown on shore by shipwreck. For without any

causa præcedente probabili, dominium alicui suum auferre mera injuria est. Bene Euripides *Helena* (vers. 456):

*Ναυαγὸς ἦκα, ξένος, ἀσύλητον γένος.*

Sum naufragus, <sup>b</sup>spoliare quod genus est nefas.

*Quod enim jus habet fiscus (verba sunt Constantini) in aliena calamitate, ut in re tam luctuosa compendium sectetur?*

Dion Prussænsis oratione VII. de naufragio locutus: *μὴ γὰρ εἴη ποτέ, ὦ Ζεῦ, λαβεῖν μηδὲ κερδάναι κέρδος τοιοῦτον ἀπὸ ἀνθρώπων δυστυχίας. Absit, o Jupiter, ut lucrum captemus tale ex hominum infortunio.*

II. 1 Lege naturæ, quæ ex ipsa domini natura ac vi sequitur, dupliciter fit alienatio, expletione juris et successione. Expletione juris fit alienatio, quoties <sup>1</sup>loco rei meæ, aut mihi debitæ, cum eam ipsam consequi non possum, <sup>c</sup>aliud tantundem valens accipio ab eo qui rem meam detinet, vel mihi

legantur, omnino abundant, et sermonem admodum hiucum efficiunt. Nimirum, ut mihi videor probabiliter conjicere, Auctor statim voluerat dicere, *loco illius, quod meum est, vel quod meum nondum est, sed mihi dari debet*, etc. Postea animadvertit, brevius dici posse: *loco rei meæ, aut mihi debita*: quum igitur brevitas esset studiosissimus, ita quoque mutavit; sed oblitus est delere nonnulla ex iis quæ jam scripserat, et quæ forsitan etiam fusius concepta erant. Vide infra, Lib. III. cap. xix. § 15. ubi plane eodem modo loquitur, dum huc remittit. *J. B.*

<sup>c</sup> *Aliud tantundem valens* Vide quæ infra libro III. c. vii. § 6. Sic ipso naturæ jure defendit Hebræos Ireneus, (Lib. IV. c. 49. Mass. 30), quod in compensationem operæ res Ægyptiorum ceperint. *Ægyptii enim, inquit, populi*

*erant debitores, non solum rerum, sed et vite suæ.* Tertullianus idem tractans secundo adversus Marcionem (Cap. 20): *Reposcunt Ægyptii de Hebræi vasa aurea et argentea. Contra, Hebræi mutuas petitiones instituant, allegantes sibi mercedem restitui oportere illius operariæ servitutis: et ostendit minus multo exactum quam debebatur.* [Adde CLEMENT. ALEXANDE. Strom. Lib. I. c. 23. p. 415. Ed. Oxon.] Cum his coherent ea, quæ dicuntur libro III. c. 11. [Delevi, quod jam in contextu positum, repetierat heic Auctor, exemplum Hesionei, ex DIOD. SICULO petitum: ubi tamen, pro 'Hesioneis', legendum 'Hioveds, Eioneus, ut ad Hygin. Fabul. 155, observavit Munckerus, et dudum antea observaverat Meziriacus, in Ovidii Epist. p. 161. T. I. nuperæ Edit. J. B.]

probable preceding cause, to take away from any one his right to his own property is mere wrong. So Euripides, Constantine, Dio Prussænsis. [See.]

II. 1 By the Law of Nature, which follows from the nature and force of ownership, alienation is made in two ways, by legal compensation and by succession.

Alienation takes place by legal compensation, as often as, in the place of a thing which is mine or is owing to me, when I cannot obtain the thing itself, I receive another thing of the same value from



debet. Nam justitia expletrix, quoties ad idem non potest pertingere, fertur ad tantundem, quod est morali æstimatione idem. Dominium autem hoc modo transferri probatur a fine, quæ in moralibus optima est probatio. Neque enim juris mei explementum consequi potero nisi dominus fiam. Frustra enim erit rei detentio, si ea uti pro arbitrio non possum. Antiquum hujus rei exemplum est in historia Diodori; ubi Hesioneus, pro his quæ filia suæ ab Ixione promissa non præstabantur, equos ipsius accipit.

2 Legibus quidem civilibus scimus vetitum esse sibi jus dicere; adeo quidem ut vis dicatur, si quis quod sibi debitum est manu reposit, et multis in locis jus crediti amittat qui id fecerit. Imo etiamsi lex civilis hoc non directe prohiberet, ex ipsa tamen judiciorum institutione sequeretur hoc esse illicitum. Locum ergo habebit quod diximus ubi judicia continue cessant; quod quomodo contingat explicavimus supra: ubi vero momentanea est cessatio, licita quidem erit acceptio rei, puta si alioqui nunquam tuum recuperare possis, aufugiente

<sup>2</sup> Modo scilicet ille, a quo petitur, sciat, aut scire possit, se debere quod petitur. Deinde frustra hoc fieret, si Creditor non inveniret rationem clam consequenda, sine ullius injuria, rei

debitæ, aut æstimationis ejus, ita ut factum a Debitore in jure probari non posset. *J. B.*

<sup>3</sup> In toto isto argumento confer *PUNENDORFIUM, De Jure Nat. et Gent.*

him who detains or owes what is mine. For expletory justice, when she cannot restore the same thing, has recourse to a thing of the same value, which is in moral estimation the same. That the ownership is transferred in such cases, is proved by the end of the procedure, which in moral cases is the best proof. For I cannot obtain compensation for my right, except I become the owner. My detention of the thing is of no use, if I cannot use it as I choose. So in Diodorus, Hesioneus took the horses of Ixion, as compensation for what he promised his daughter and did not give.

2 By the Civil Law indeed, it is, as we know, forbidden to execute justice for one's self; so that it is called violence, if any one take by act what is owing to him; and in many places he loses the right of a creditor who does so. And indeed if the Civil Law did not directly prohibit this, it would follow from the institution of judicial tribunals that it is unlawful. Therefore the rule that we have laid down holds, when the course of regular justice is *continuously* interrupted, as we have explained above, (i. iii. 2). When the interruption is momentary, the taking of the thing will be lawful, in case you cannot otherwise recover what is yours; for example, if your debtor be running away. But the establishment of

*Sylv. in Ferr. Eccl. p. 2. q. 13.*

*Lib. iv. 71. p. 180.*

*L. 5. D. de acq. poss. li. § 18. De vi Bon. Rap. xlii. D. Quod met. vii. 8. D. ad i. Jul. de of. priv. Thom. 2. 2. 66. art. 5.*

*L. 54. C. de decur. l. 12. C. de ep. et cler. DD. in l. 28. § 1. in fin. D. ad i. Aquil.*

forte debitore. Sed dominium a judicis additione erit expectandum, quod fieri solet in repressaliis, de quibus infra erit agendi locus. Quod si jus quidem certum sit, sed simul moraliter certum, per judicem juris explementum obtineri non posse, puta quia deficiat probatio; in hac etiam circumstantia cessare legem de judiciis, <sup>2</sup>et ad jus rediri pristinum verior sententia est.

Bart. in tr.  
Repress. q.  
60.

III. Successio ab intestato quæ dicitur, <sup>3</sup>posito dominio, remota omni lege civili, <sup>d</sup>ex conjectura voluntatis naturalem habet originem. Nam quia domini ea vis erat, ut domini voluntate transferri in alium posset, etiam mortis causa, ac re-tenta possessione, ut supra diximus; si quis voluntatis suæ nullam edidisset testationem, cum tamen credibile non esset ejus eum mentis fuisse, ut post mortem suam bona occupanti cederent, sequebatur ut ejus esse bona intelligerentur, cujus ea esse voluisse defunctum maxime erat probabile. *Defunctorum voluntatem intellexisse*, inquit Plinius junior, *pro jure est*. Creditur autem in dubio id quisque voluisse quod æquissimum

Soto de Just.  
q. 3. art. 2.  
Cajet. d. q. 66.

Lib. iv. Ep.  
10. et Lib. II.  
Ep. 18. et Lib.  
v. Ep. 7.

Lib. iv. cap. 11. J. B.

<sup>d</sup> *Ex conjectura voluntatis natura-  
lem habet originem] Ideo fideicommissa  
dari possunt ab intestato succedentibus,*

*quoniam creditur paterfamilias sponte  
sua his relinquere legitimam heredita-  
tem, ait Paulus L. conficiuntur. 8. § 1. D.  
de Jure Codicillorum.*

ownership must be waited for till the judge assigns it, as is usual in *reprises*; of which we shall hereafter treat. But if the right be certain, and at the same time it be morally certain that compensation cannot be obtained from the judge; for example, for want of proof; the truer opinion is, that under the circumstances, the law concerning the tribunals ceases, and the matter reverts to the primitive rule.

III. Succession to intestate property, setting aside the Civil Law, has its natural origin in the conjecture of the will of the last possessor. For inasmuch as the force of ownership was such that the property might, by the will of the owner, be transferred to another, even on account of approaching death, and with possession retained, as we have said before; if any one has made no manifestation of his will, and yet it be not credible that he was so minded that his property should after his death come into the hands of any one who should take possession of it; it followed that the property should belong to him to whom it was most probable that the defunct person wished it to belong. As Pliny says, It is a rule of law to understand the will of persons defunct. And in a doubtful case, every one is supposed to have willed that which is most

atque honestissimum est. In hoc autem genere prima est causa ejus quod debetur, proxima ejus quod etsi non debetur, officio congruit.

Franc. Pisei.  
de stat. exc.  
sem. n. 133.  
Mench. in  
Auth. novis.  
C. de inoff.  
test. n. 286.  
Teil. Fern. in  
l. 10. Taurin.  
q. 4.

IV. 1 Disputant Jurisconsulti, an alimenta a parentibus liberis debeantur? Nam quidam sentiunt esse quidem naturali rationi satis consentaneum, ut a parentibus alantur liberi, debitum tamen non esse. Nos omnino distinguendum arbitramur <sup>4</sup>in voce debiti, quod stricte interdum sumitur pro ea obligatione, quam inducit jus expletorium; interdum laxius, ut significet id quod nisi inhoneste omitti non potest, etiamsi honestas illa non ex justitia expletrice, sed ex alio fonte profisciscatur. Est autem id de quo agimus (nisi lex aliqua humana accedat) debitum illo sensu laxiore. Ita accipio quod dixit Valerius Maximus: *Parentes nos alendo*, inquit, *nepotum nutriendorum debito alligarunt*. Et Plutarchus in libello elegantissimo de prolis amore: *οἱ παῖδες ὡς ὀφείλημα τὸν κληρὸν ἐκδέχόμενοι*. <sup>5</sup>*liberi hereditatem ut sibi debitam expectant*. Quia dat formam, dat quæ ad formam sunt necessaria, dictum est Aristotelis: quare qui causa est ut homo existat, is quantum in se est, et quantum necesse est, prospicere ei debet de his quæ ad vitam humanam, id est, naturalem ac socialem, nam ad eam natus est homo, sunt necessaria.

Lib. II. 9.  
num. 1.  
Tom. II. p.  
497 a.

<sup>4</sup> Distinguendum potius inter tempus, quo liberi non possunt sibi ipsi alimenta querere, et tempus, quo id possunt. Priori tempore, omnino et ex jure stricto parentes liberos alere tenentur: posteriori, non ita tenentur, sed nemo est tamen, cui potius de alimentis prospicere, et bona sua etiam, vel saltem majorem partem, relinquere eos honestum sit. *J. B.*

<sup>5</sup> *Liberi hereditatem ut sibi debitam*

*expectant*] Julianus Cæsaribus *παῖσι τε γὰρ νόμιμον ἐπιτρέπει τὰς διαδοχὰς*. *Æquum, liberis hereditatem relinquere*. (pag. 334 D. *Edit. Spanhem.*) Etiam filiabus, quas juxta filios heredes parentum fuisse more antiquissimo testatur Jobi historia in fine. Hanc æquitatem respiciens Augustinus, ne ab ecclesia quidem recipi vult bona eorum, qui liberos suos exheredabant. Loca sunt libro 1. de Vita Clericorum, (cap. 3) et ser-

equitable and proper. And in this case, the first claim is that which is strictly due; the next that which, though not strictly due, is conformable to duty.

IV. 1 Jurists dispute whether children have a right to aliment from their parents. For some are of opinion that it is indeed agreeable to natural reason that children should be supported by their parents, but that it is not a debt or due. We make a distinction as to the word *debt* or *due*; which strictly taken, is sometimes taken for the obligation introduced by expletory *jus*; but sometimes, more laxly, that which cannot be decently omitted, though that de-

2 Ea de causa, instinctu scilicet naturali, cetera quoque animantia proli suæ, quantum necesse est, alimenta suppeditant. Unde Apollonius Tyanæus quod ab Euripide erat dictum, (*Androm.* vers. 418):

Philostr. in  
opus Vit.  
ll. 14, 15.

Ἄπασι δ' ἀνθρώποισιν ἡ ψυχὴ τέκνα.

Cunctis hominibus liberi vita altera.

Ita emendabat:

Ἄπασι δὲ ζώοισιν ἡ ψυχὴ τέκνα.

Animantibus quasi vita sunt partus sui:

Plurimis sane allatis argumentis quibus insitum hunc affectum probat, quæ videre est apud Philostratum libro VII. capite septimo et octavo: cum quo loco optime consentit is qui est apud Oppianum de venatu tertio, et de piscatu primo. Et in *Dictye* tragœdia idem ille Euripides hanc unam omnium legem esse ait, quæ et hominibus inter se, et cum ceteris animantibus communis sit: hinc jurisconsulti veteres liberorum educationem ad jus naturale referunt, id est, ad illud quod cum instinctus naturæ aliis quoque animantibus commendat, nobis ipsa præscribit ratio. *Naturalis stimulus*, ut Justinianus loquitur, id est, *στοργή*, parentes ad liberorum educationem hortatur. Idem alibi: *Filium vel filiam alere patri necesse*

Cap. 14, 15.

Apud Stobm  
[[81. p. 474.]

Fr. Inst. de  
Jur. Nat.  
Gen. l. Jur. 1.  
§ Jus Nat. 3.  
D. de Just. et  
Jur.  
L. Un. § Tac.  
5. ver. silent.  
C. de rei us.  
act.  
L. ult. C. de  
don. quas  
lib. § ips. 5.

mone LII. ad *Frates in Erema*, si tamen id opus Augustini est. Posuit ea Gratianus in causa XIII. quæst. II. (c. 8) et causa XVII. quæst. IV. in fine. (c. 43). Procopius *Persicorum* I: οἱ νόμοι τῶ διαλλάσσουντι ἀλλήλοις διὰ ἐν πᾶσιν ἀνθρώποις μαχόμενοι, ἐνταῦθα ἐν τῇ Ῥωμαίοις καὶ πᾶσι βαρβάροις ξυνίασι τε καὶ ξυνομολογοῦντες ἀλλήλοις κυρίους ἀποφαίνουσι τοὺς παῖδας εἶναι

τοῦ πατρὸς κλήρου' *Leges que ceterum inter homines plurimis differentiis invicem pugnant, in hac re tam apud barbaros quam apud Romanos consentiunt atque conspirant, ut liberos dominos pronuntient rerum a patre relictarum.* (Cap. 11.)

Quibus insitum hunc affectum probat] Plinius x. 33. de *Hirundinibus*. In fetu summa æquitate alternant cibum.

ency proceeds not from expletory justice, but from some other source. Now what we here speak of is (except there be in addition some human law) a debt or due in the laxer sense. So Valerius Maximus, Plutarch. [See.] That he who gives the form gives what is requisite to the form, is a dictum of Aristotle. Therefore he who is the cause of a man's existence, ought, as far as he can and as far as is necessary, to provide him with the things necessary to human life, that is, natural and social life.

2 So other animals by natural instinct provide for their offspring. Hence Apollonius Tyanæus so amends Euripides, and gives many arguments, which see in Philostratus; and so Appian: and Euripides in the *Dictys*.

Lib. II. 80.  
P. 24.

*est propter ipsam naturam.* Diodorus Siculus: ἀγαθὴ γὰρ ἡ φύσις διδάσκαλος ἅπασιν τοῖς ζώοις ἐστὶ πρὸς διατήρησιν οὐ μόνον ἑαυτῶν, ἀλλὰ καὶ τῶν γεννωμένων, διὰ τῆς συγγενοῦς φιλοζωίας τὰς διαδοχὰς εἰς αἰδίου ἄγρουσα διαμονῆς κύκλον. *Optima quippe magistra natura est cunctis animantibus, non tantum ad sui, sed et ad proles suæ conservationem, ut cognata hac caritate continua successio ad æternitatis circulum perveniat.* Apud Quintilianum filius, *partem jure gentium peto.* Sallustius testamentum quo filius excluditur impium dixit. Et quia naturale est hoc debitum, ideo etiam vulgo quæsitos alere mater debet.

Inst. Orat.  
vii. 1.  
Frag. iv. 2.

L. Si quis 5.  
§ Ergo, 4.  
D. de agnos.  
lib.

C. Cum habe-  
ret 5. de eo qui  
dicit. quam  
põl. adu.

3 Et quanquam ex damnato legibus concubitu natis nihil relinqui leges Romanæ volebant, sicut et naturalibus ne quid relinquere necesse esset caverat lex <sup>5</sup>Solonis, canones Christianæ pietatis hunc rigorem correxerunt, qui docent qualibuscumque liberis id recte relinqui, imo si opus sit relinquendum etiam, quod ad alimenta necessarium est. Nec aliter capiendum quod dici solet, legitimam humanis legibus tolli non posse, quatenus scilicet in legitima insunt alimenta necessaria. Nam quod supra est, tolli potest non repugnante natura.

4 Alii autem debent non tantum liberi primi gradus, sed et secundi, si ita res ferat, et ulterioris: quod ostendit Justinianus, cum non filios tantum, sed et qui deinceps sunt, alendos

L. ult. § 1.  
C. de bon.  
quæ, Lib. v.  
§ 1. 5. 1. 8.  
D. de agn.  
lib.

<sup>5</sup> Memoria heic fefellit Auctorem nostrum. Solon enim non solvit parentes necessitate aliquid relinquiendi na-

tis ex concubitu illegitimo; sed contra liberos naturales solvit necessitate alendorum parentum: Τὸ μὴδὲ τοῖς ἐξ

Hence the old jurists refer the bringing up of children to Natural Law; that is, to that class of things which Instinct recommends to animals, and Reason to man. So Justinian, Diodorus Siculus, Quintilian. Sallust calls a testament in which the son is excluded, *impious*. And since this is a natural due, the mother ought to support her children of which the father is uncertain.

3 And though the Roman Laws directed that those born of a cohabitation condemned by the laws should have no legal inheritance, as the law of Solon provided that it was not necessary to leave anything to natural children; the rules of Christian piety corrected this rigour, and teach that all children may rightly have that left them by their parents, and if need be, should have that left them, which is sufficient to support them. And thus is to be taken what is usually said; that the lawful share of the inheritance (*legitima*) cannot be taken away by human laws: that is, so far as this lawful share implies necessary aliment. For what is more than this may be taken away without

propter ipsam naturam pronuntiat: quod ad eos etiam producitur, qui per mulieres ex nobis veniunt, si aliunde ali non possunt.

V. 1 Debentur quidem et parentibus alimenta: quod non legibus tantum proditum est, sed vulgari proverbio ἄντι-πελαργεῖν; adeo quidem ut laudetur Solon, quod qui id non facerent eos notarit infamia. Sed non hoc æque est ordinarium atque illud quod de liberis diximus; nam liberi cum nascuntur nihil secum afferunt unde vivant: adde quod vivendum diutius habent quam parentes: atque ideo sicut honor et obsequium parentibus debetur, non liberis, ita educatio liberis magis quam parentibus: quo sensu accipio illud Luciani: καὶ τοί γε ἡ φύσις τοῖς πατράσι τοὺς παῖδας μᾶλλον ἢ τοῖς παισὶ τοὺς πατέρας ἐπιτάττει φιλεῖν. *Magis natura jubet a parentibus liberos, quam a liberis parentes diligere.* Et illud Aristotelis: μᾶλλον συνφεύεται τὸ ἀφ' οὗ τῷ γεννηθέντε, ἢ τὸ γεννώμενον τῷ ποιήσαντι. τὸ γὰρ ἐξ αὐτοῦ οἰκεῖον τῷ ἀφ' οὗ. *Magis afficitur causa gignens erga genitum, quam genitum erga gignentem. Nam quod ex aliquo ortum est, id ei quasi proprium est.*

Diog. Laert.  
in Solon. § 88.

In Abdic.  
Tom. I. p. 781.

Met. Nic. viii.  
14.

2 Hinc fit, ut etiam citra auxilium legis civilis prima bonorum successio liberis deferatur; quia creduntur parentes illis, ut corporis sui partibus, non tantum de necessariis, sed et

ἑταίρας γενομένοις ἐπανάγκες εἶναι  
τοὺς πατέρας τρέφειν etc. ait PLUTAR-  
CHUS, in ejus Vit. pag. 90 E. J. B.

ἢ ἄντιπελαργεῖν] Vide Leonem  
Afrum libro IX. de Nesro. (Pag. 388.  
Ed. Elzevir.)

transgressing Natural Law.

4 Not only descendants in the first degree, but in the second, if necessary, and in ulterior degrees, ought to be supported. So Justinian. And this extends to those who are descendants through females, if they have no other source of support.

V. 1 Also aliment to parents is due from their children: which is not only a matter of law, but expressed by a proverbial term referring to the supposed filial piety of the stork. And Solon is praised for marking with infamy those who do not discharge this due. But this is not so ordinarily applicable as the rule concerning children; for children, when they are born, bring with them nothing on which to live: add to which, that they have to live longer than the parents have. Therefore as honour and obedience are due to parents, not to children, so support is due to children more than to parents. So Lucian and Aristotle.

2 Hence, even without the aid of the Civil Law, the first rule of suc-

de his, quæ ad vitam suavius honestiusque transigendam pertinent, quam uberrime voluisse prospectum, ab eo maxime tempore, quo ipsi rebus suis frui non possent. *Ratio naturalis*, inquit Paulus Jurisconsultus, *quasi lex quædam tacita liberis parentum hereditatem addicit, velut ad debitam successionem eos vocando*. Papinianus vero: <sup>b</sup>*Non sic parentibus liberorum, ut liberis parentum debetur hereditas. Parentes ad bona liberorum ratio miserationis admittit: liberos naturæ simul et parentum commune votum; id est, liberos hereditas sequitur partim quidem ob præcisum debitum naturale, partim ex conjectura naturali, qua parentes creduntur id velle, ut liberis quam optime prospectum sit. Sanguini honorem debitum reddidit*, ait Valerius Maximus de Q. Hortensio, qui filium minus sibi probatum heredem scripserat. Huc spectat illud Apostoli Pauli: *οὐ γὰρ ὀφείλει τὰ τέκνα τοῖς γονεῦσι θησαυρίζειν, ἀλλ' οἱ γονεῖς τοῖς τέκνοις. Non enim liberi parentibus, sed parentes liberis rem congerere et servare debent.*

L. Cum Rat.  
7. D. de don.  
damn.

Leg. 7. § 1.  
D. Si tab.  
test.

Lib. v. 9.  
num. 2.

2 Cor. xii. 14.

<sup>b</sup> *Non sic parentibus liberorum, ut liberis parentum debetur hereditas*] Philo de Vita Mosis III. (Pag. 689 E. Ed. Paris.) ἐπειδὴν ὁ νόμος φύσει ἔστι κληρονομεῖσθαι τοὺς γονεῖς ὑπὸ παιδῶν, ἀλλὰ μὴ τοὺτους κληρονομεῖν, τὸ μὲν ἀπευκαταῖον καὶ παλιμφημον ἡσύχασε· *Cum lex sit naturæ ut liberi parentibus, non parentes liberis in bona succedant, Moses id quod contra vota parentum malique ominis erat texit silentio.* Xenophon libro II. Socraticorum: ὁ μὲν ἀνὴρ τοῖς μέλλουσι ἔσεσθαι παισὶ προκατασκευάζει πάντα ὅσα αὐ οἴηται συνοίσειν αὐτοῖς πρὸς τὸν βίον,

καὶ ταῦτα ὡς αὐ δύνηται πλείεστα· *Vir iis quos habiturus est liberis parat omnia quæ uni fore ad vitam putat, et quidem quam maxima potest in copia.* (Cap. 2. § 5).

<sup>1</sup> *Ut nepos filii loco succedat*] Quod Hebræi dicunt, *filii etiam in sepulchro succedit*; item: *filii filiorum sunt tanquam filii.* (Vide SELDEN. De Successionib. ad Leges Hebr. Lib. I. c. 1 et 2). Meminit ejus juris ut naturalis Jacchides ad Danielelem v. 2: *Æquissimum esse videtur nepotes neplesque in patris sui locum succedere*, ait Justinianus titulo institutionum de Hereditatibus quæ

cession is, that the goods go to the children; because the parents are believed to have intended to provide for them, as for parts of their own bodies, not only necessities, but all things which pertain to an agreeable and decent life, and especially after they cease to be able to enjoy their property. So the Jurists Paulus, Papinian. So Valerius Maximus says of Hortensius, when he made his son his heir, though disapproving his character, that *He rendered the due honour to the tie of blood.* So St Paul, 2 Cor. xii. 14.

VI. It is ordinarily the case, that the father and mother provide for their children, and therefore, so long as they are alive, the grandfather and grandmother are not bound to furnish them aliment; but

VI. Quia vero et hoc ordinarium est, ut pater materque liberis suis prospiciant, ideo, dum illi extant, avi aviaque ad alimenta danda teneri non intelliguntur: ubi illi, eorumve alter defecerit, æquum est, ut avus aviaque pro mortuo filio filiaque curam suscipiant nepotum ac neptium: quod et in parentibus longius remotis pari ratione procedit. Atque hinc ortum traxit jus illud, <sup>i</sup>ut nepos filii loco succedat, quemadmodum Ulpianus loquitur. Id Modestinus dixit, τὸν τοῦ πατρὸς ἀποθανόντος τόπον πληροῦν. Justinianus, τὴν πατρίαν ὑπεισιέναι τάξιν. Isæus oratione de Philoctemonis hereditate, hoc ipsum <sup>6</sup>vocat ἐπανιέναι. Philo Judæus: *υἰωνοὶ γὰρ πατέρων ἀποθανόντων ἐν υἱῶν τάξει παρὰ πάπποις καταριθμοῦνται*. *Nepotes parentibus mortuis apud avos filiorum obtinent locum.* Vicariam hanc successionem, <sup>k</sup>quæ per stirpes fit, repræsentationem vocare amant recentiores jurisconsulti; quam valuisse etiam apud Hebræos, divisio agrorum terræ Jacobi filiis <sup>7</sup>promissæ, aperte satis ostendit. Sicut filius et

L. 7. D. de his qui s. v. et. jur. s. l. 2. § 7. D. de exc. cur. Novcl. 137. pr.

Legatione ad Cæsum.

ab intestato deferuntur. (§ 6). Pietati id adscribit Eginhardus in *Vita Caroli Magni.* (Cap. 9. *Ed. Schminck.*) κατιόντας εἰς τὸν ἰδίου γονέως τόπον ὑπεισελεθεῖν. *Posterius in sui quemque parentis locum subire*, dixit Michael Attaliata.

<sup>6</sup> Locus est pag. 467. *Ed. Weck.* Ὁ γὰρ νόμος οὐκ ἐᾷ ἐπανιέναι, εἰ μὴ υἱὸν καταλίπη γνήσιον. Sed ibi non agitur de successione Nepotis in locum filii, verum de Filii Adoptivi reditu in familiam Patris Naturalis, qui reditus fieri non poterat, nisi ipse in familia Patris Adoptivi reliquisset filium legi-

timum: idque secundum Legem Solonis, quæ legitur integra apud DEMOSTHENEM, *Orat. in Leochar.* pag. 673 B. Adeoque locus omnino alienus est a re, de qua agitur. *J. B.*

<sup>k</sup> *Quæ per stirpes fit*] Sic in sortendis urbibus inter Heraclidas Proclo et Eurystheni, ut ab Aristodemo venientibus, una sors fuit contra Temenum et Cresphontem: meminit Apollodorus libro II. (c. 8. § 4). Pausanias (*Messeniac.* c. 3). Strabo Lib. VIII. [pag. 364].

<sup>7</sup> Posterius Ephraim et Manassis non tantum propter *jus repræsentationis* partem habuerunt Terræ promissæ:

when the parents, or one of them, fails, it is equitable that the grandfather and grandmother should undertake the care of the grandchildren for their defunct son and daughter: and this goes on in like manner to parents still further removed. And hence is the origin of that right by which the grandson succeeds in the place of the son, as Ulpian speaks. See Modestinus, Justinian, Isæus, Philo Judæus, Demosthenes. This vicarious succession by family branches, the more recent Jurists call *Representation*. This prevailed among the Hebrews also, as the division of the promised land among the sons of Jacob, plainly shews. [Ephraim and Manassch, the sons of Joseph, having a lot; but in fact they had *each* a lot, being adopted. *J. B.*]



p. 661 B.

filia proximi sunt cuique, ita et qui ex filio filiave nascuntur, ait Demosthenes oratione adversus Macartatum.

VII. Quæ autem diximus hactenus de conjectura voluntatis, ita locum habent, nisi in diversum indicia suppetant. In hoc indiciorum genere primum habet locum abdicatio, quæ Græcis, tum <sup>1</sup>exhereditatio, quæ Romanis fuit usitata. Ita tamen ut ei, qui mortem peccatis suis meritus non est, alimenta præstanda sint, ob eam quam supra attulimus rationem.

Odys. l. 216.

VIII. 1 Sed et illa regulæ exceptio addenda est, si non satis constet hunc illo esse genitum. Verum est de factis nullam esse certam perceptionem: sed ea, quæ solent in hominum conspectu fieri, sui generis certitudinem habent ex testimonio: quo sensu mater certa esse dicitur, quia inveniuntur qui quæve partui et educationi adfuerint: at de patre hujus gradus certitudo haberi non potest, quod Homerus indicat dicens:

Ὀὐ γὰρ πῶ τις ἐὼν γόνου αὐτὸς ἀνέγνω.

Generis nemo sibi conscius ipse est.

Et eum sequutus Menander<sup>2</sup>:

Αὐτὸς γὰρ οὐδεὶς οἶδε πῶς ἐγένετο.

Nemo ipse novit quo sit exortus satu.

sic enim ambo unam tantum sortiri debuisse, qualem Josephus pater ipsorum consequutus erat. Verum adoptionis jus heic valuit, ut Auctor noster

ipse observat in Nota ad § sequ. J. B.

<sup>1</sup> Exhereditatio, quæ Romanis fuit usitata] Vide *Baba Kama* cap. ix. § 10. vide infra § xxv.

VII. What we have said of the conjectured will, holds only if there be no evidence to the contrary. Amongst such evidence, the first place belongs to *abdication* of a son, which was practised by the Greeks, as *exheredation* [disinheriting] was by the Romans: but this rejection or disinheriting of a son, if he had not merited death by his crimes, was to be so limited that he was to be provided with aliment, as we have stated above.

VIII. 1 To the rule of a man providing for a son, this exception also is to be added; if it be not sufficiently certain that he is really his son. Things which are done in the sight of men have a certain degree of certainty from testimony; and as persons are usually present at the birth of a child, the mother is known, but the father cannot be known with the same certainty. So Homer, Menander.

Hence it was necessary to find some other way in which it might be known who was the father of a child: and the way is, marriage in its natural state, that is cohabitation, the woman being in the custody of

Qui et alibi [Apud Stob. *Florileg.* tit. 76]:

\*Ἔστιν δὲ μήτηρ φιλότεκνος μᾶλλον πατὴρ,  
Ἥ μὲν γὰρ αὐτῆς οἶδεν υἱόν, ὃ δ' οἶεται.

Mater tenerius liberos amat patre:

Quia mater esse scit suos, pater autumat.

Ideo ratio aliqua reperienda fuit, qua probabiliter constaret quis esset partus cujusque pater. Ea ratio est, conjugium sumtum in terminis naturalibus, id est, consociatio, qua femina sub maris custodia constituitur. Sed etsi alio quovis modo constet quis fuerit pater, aut pater id pro explorato habuerit, naturaliter is partus non minus quam alius quivis succedet. Quidni? cum etiam <sup>m</sup>extraneus palam pro filio habitus, quem adoptatum vocant, succedat ex conjectura voluntatis?

2 Naturales vero, etiam post lege introductum eorum discrimen a legitimis,

(Τῶν γνησίων γὰρ οὐδὲν ὄντες ἐνδεεῖς  
Νόμφ ροσοῦσιν.

Notha parte nulla sobole legitima minor,

Sed lege premitur.

Ut dixit Euripides) possunt tamen adoptari, nisi lex obstat. Atque id olim permittebat lex Romana Anastasii, sed postea in justis matrimonii favorem difficilior quædam ratio eos legi-

*Prog. Andromeda:*  
[xxvii. ed. Dindorf.]

*L. Jud. & C. d. Nat. Lib.*

<sup>8</sup> Habet ab ΕΥΣΤΑΘΙΟ, in Homer. pag. 1412. *Ed. Rom.* ubi tamen alio modo et sensu, quem Auctor ipse sequitur in versione sua: Αὐτὸν γὰρ οὐδεὶς

οἶδε τοῦ πατρ' ἐγένετο &c. *J. B.*

<sup>m</sup> *Extraneus palam pro filio habitus*] Aut nepos in filium adoptatus, ut a Jacobo nepotes Ephraim et Manasses.

the man. But if it be known in any other way who is the father, or the father have ascertained the fact, such offspring, as well as any other, does by Natural Law succeed. Why not? Since a stranger, adopted as a son, also succeeds from the conjectured will.

2 Natural children, even after the law has made a difference between them and legitimate children, [see Euripides,] may be adopted [by the father], except the law interpose. This was formerly permitted by the Roman Law of Anastasius: but afterwards, in order to favour legitimate marriage, a more difficult way of putting them on a footing of equality with legitimate children was introduced, *per curias oblationem*, by offering them to be *Curiales* [a burthensome condition], or by subsequent marriage [of the parents]. An example of the old adoption of natural children we have in the sons of Jacob, who were by their father made equal to the sons of free women, and received equal parts in the inheritance.

timis æquandi reperta est, per curiæ oblationem, aut subsequens matrimonium. Exemplum veteris adoptionis naturalium est in Jacobi filiis, qui adæquati a patre sunt liberarum mulierum filiis, et æquis partibus hereditatem creverunt.

3 Contra evenire potest, non ex lege tantum, sed et ex pactione, <sup>n</sup>ut qui ex conjugio nati sunt, alimenta sola habeant, aut certe excludantur a præcipua hereditate. Conjugium tali pacto initum etiam cum libera femina concubinatum *Gen. xxv. 6.* Hebræi vocant, quale erat Abrahami cum Cethura, cujus liberi perinde ut Ismaël, ancillæ Agar filius, dona, id est, legata quædam acceperunt; hereditatem autem non creverunt. Tale est matrimonium ad morgengabicam quod dicitur: a quo non longe abeunt secundæ nuptiæ <sup>o</sup>apud Brabantos: nam rerum soli, quæ exstabant cum matrimonium prius solveretur, proprietas acquiritur prioribus liberis.

IX. 1 Ubi desunt liberi, quibus naturaliter deferatur successio, minus expeditum est, nec ulla in parte magis

<sup>n</sup> *Ut qui ex conjugio nati sunt, alimenta sola habeant*] Ut olim filii post primum geniti in Mexicanis terris. [Vide Fr. Lopez de Gomara, *Hist. gener. Ind.*

*Occid. Lib. II. c. 76].*

<sup>o</sup> *Apud Brabantos*] Vide legem similem veterum Burgundionum, Lib. I. tit. I. n. 2. [De Brabantis vide Petrum

3 On the other hand, it may happen, not only by law but by compact, that children born in marriage may receive aliment alone, or at least may be excluded from the principal inheritance. A marriage contracted on such a compact, even with a free woman, the Hebrews called concubinage; such was the marriage of Abraham with Keturah, whose children, like Ishmael the son of Hagar, received certain gifts or legacies, but did not succeed to the inheritance of their father. Such is the marriage which is called *morgengabe*: and not very different from this is the law of second marriages among the Brabanters: for the landed property which existed when the former marriage was dissolved passes to the children of the first marriage.

IX. 1 Where there are no children to whom the succession may naturally fall, the case is less clear; nor is there any point in which Laws are more various. The whole variety however may be referred mainly to two sources; one of which respects the proximity of degree, the other directs the property to return to the quarter from which it came; as the phrase is, the father's goods to the father's house, the mother's to the mother's. We find it necessary to make a distinction between the property of the father and grandfather, (as it was expressed in the formula\* in which the prodigal was interdicted from the con-

\* The formula was this: Quando tua bona paterna avitæque nequitia tua dis-

variant leges. Tota tamen varietas ad duos maxime fontes referri potest, quorum alter respicit proximitatem gradus, alter bona redire vult unde venerant; quod dici solet, paterna paternis, materna maternis. Nobis omnino distinguendum videtur inter <sup>p</sup>bona paterna avitæque, ut dici solebat in formula qua prodigo bonis interdicebatur, et inter <sup>q</sup>noviter quæsitæ, ut in illis locum habeat Platonis illud: ἐγὼ οὖν νομοθέτης ὢν οὐθ' ὑμᾶς ὑμῶν αὐτῶν εἶναι τίθημι, οὔτε τὴν οὐσίαν ταύτην, ξύμπαντος δὲ τοῦ γένους ὑμῶν, τοῦ τε ἔμπροσθεν καὶ τοῦ ἔπειτα ἐσομένου. *Ego legum conditor neque vos vestri juris esse scisco, neque patrimonium vestrum, sed totius vestri generis, tum quod fuit, tum quod futurum est.* Qua de causa Plato κλήρον πατρῶων salvum esse vult generi, unde venit. Quod non ita accipi velim, quasi naturaliter de bonis paternis avitisque testari non liceat (sæpe enim indigentia amici alicujus efficit, ut id non laudabile modo sit, sed etiam necessarium) sed ut appareat

Stockman. in libro *De jure Devolutio- nis etc.* J. B.]

<sup>p</sup> *Bona paterna avitæque*] Hebræis מורשה.

<sup>q</sup> *Noviter quæsitæ*] Hebræis נחלה. Discrimen hoc vide in *lege Burgundica* Lib. i. tit. i. num. 1.

<sup>r</sup> *Sæpe enim indigentia amici ali-*

trol of property,) that is, the old inheritance, and new acquisitions. The former are to be regulated by Plato's rule; who directs the *patrimonial lot* to be kept inviolate for the family to which it belongs. Which we are not so to accept as if it were not lawful to dispose by testament of property received from father or grandfather, (for that is often not only laudable but necessary,) but that it may appear what is to be supposed the will of an intestate person in a doubtful case. For we grant that the person of whom we speak has in him plenary ownership †.

2 But since he cannot retain his ownership after death, and it must be held for certain that he would not lose the means of doing a favour to some one; let us consider what is the most natural order of such favours ‡. Aristotle says that we are to repay obligations before we confer favours; and so Cicero, Ambrose. But obligations may be repaid to the living or to the dead: to the dead, in their children who

pendis, liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdico. Paulus 3. Sent. tit. 4. § 7. *Gronovius.*

† It is plain that Plato's law withholds plenary ownership. W.

‡ The making the owner so completely the master of his property even after his death, that it is to be disposed of by conjecture as to what he would have wished, rather than by any other rule, is an extreme view of ownership. W.

quæ in dubio credenda sit fuisse voluntas intestati. Concedimus enim plenum dominium esse penes eum, de cujus voluntate agimus.

*Ethic. Nic.*  
ix. 2.

*De Offic. l. 15.*

*De Offic. l. 31.*

*or. l. 31.*

*Cap. 20, et seqq.*

*L. Quod scilicet. C. de bon. quas Lib. l. 1. de emanc. § 1. Cum enim. C. de leg. her. l. Sanc. ii. l. Com. de succ. Novel. 84. de cons. et inter. frat.*

2 Sed cum post mortem dominium hoc retinere non possit, et omnino pro certo haberi debeat, noluisse eum perdere beneficii materiam, videndum est quis sit in beneficiis ordo maxime naturalis. Bene Aristoteles: *ἐνεργέτη ἀναποδοτέον χάριν μᾶλλον ἢ ἑταίρω δοτέον. Potius est gratiam referri ei qui beneficium, quam amico conferre beneficium.* Et Cicero: *Nullum officium referenda gratia magis necessarium est.* Item: *Cum duo genera liberalitatis sint, unum dandi beneficii, alterum reddendi; demus nec ne, in nostra potestate est; non reddere bono viro non licet: modo id facere possit sine injuria.* Ambrosius: *Pulchrum est propensiores haberi ejus rationem, qui tibi aut beneficium aliquod aut munus contulit.* Et mox: *Quid enim tam contra officium, quam non reddere quod acceperis? Gratia autem refertur aut viventibus, aut defunctis. Defunctis, ut ostendit Lysias oratione funebri, refertur gratia in eorum liberis, qui naturaliter pars sunt parentum, et quibus, si viverent parentes, maxime vellent benefieri.*

3 Et hanc æquitatem sequuti sunt Justiniani juris conditores, æquitatis studiosissimi, in quæstione inter fratres plenos, et consanguineos, et uterinos, et aliis quibusdam

*cujus efficit, ut id non laudabile modo sit] Seneca de Beneficiis libro IV. c. 11. Quid cum ipso vitæ in fine constitimus, cum testamentum ordinamus, non beneficia nobis nihil profutura dividimus? quantum temporis consumitur, quamdiu secreto agitur, quantum, et quibus demus? quid enim interest quibus demus a nullo recepturi? Atqui nunquam diligentius damus, nunquam magis judicia*

*nostra torquemus, quam ubi, remotis utilitatibus, solum ante oculos honestum stetit?*

\* *Aut defunctis] Sic moriturus apud Procopium Pers. I. τὰ παῖδια ἀφελῶν, ἀφελήσεις ἐμέ. In me confertes quidquid in liberos meos contuleris. (Cap. 4). Vide exemplum in facto Theodosii, patrem Valentiniani junioris in ipso Valentiniano remunerantis, apud Zosimum*

are a part of them; and whom if they were alive they would wish to have benefited. See Lysias.

3 And this equity has been recognized by the careful framers of Justinian's code, in the question between full brothers, and brothers by the father's side, and by the mother's; and in some other cases. See Aristotle: Valerius Maximus. In Justin it is called *gentium commune jus* for brother to succeed to brother.

4 When he is not to be found from whom the property came, nor

Aristoteles: ἀδελφοὶ ἀλλήλους φιλοῦσιν τῷ ἐκ τῶν αὐτῶν πεφυκέναι· ἢ γὰρ πρὸς ἐκεῖνα ταυτότης ἀλλήλοις ταυτοποιεῖ. *Fratres se invicem diligunt quatenus ex iisdem nati sunt; nam ortus communis ipsos quasi eosdem facit.* Valerius Maximus: *Ut merito primum amoris vinculum ducitur, plurima et maxima beneficia accepisse, ita proximum judicari debet simul accepisse.* Gentium commune jus, ut frater fratri succedat, dicitur apud Justinum.

Eth. Nicom. viii. 14.

Lib. v. 5.

Lib. x.

4 Quod si non reperitur is, a quo proxime bona venerunt, ejusve liberi, restat ut gratia referatur his, quibus minus quidem, sed tamen post illum proxime debetur, id est parenti superioris gradus, ejusque liberis, præsertim cum eo modo maneat intra proximos, et ejus, de cujus hereditate agitur, et ejus, a quo proxime bona venerunt. Idem ille Aristoteles: ἀνεψιοὶ δὲ καὶ οἱ λοιποὶ συγγενεῖς ἐκ τούτων συνκωκίω-  
ται· τῷ γὰρ ἀπὸ τῶν αὐτῶν εἶναι γίνονται οἱ μὲν οἰκειότεροι, οἱ δὲ ἀλλοτριώτεροι. *Patruales vero et ceteri cognati conjunguntur per parentes, quatenus ex iisdem ortum habent: ita ut alii conjunctiores sint, alii minus conjuncti, pro ortus ratione.*

Ethic. Nic. viii. 14.

X. 1 At in bonis noviter quæsitis, quæ περίοντα τοῦ κλήρου Platoni, cum cesset gratiæ referendæ officium; superest, ut ei deferatur successio, qui defuncto carissimus fuisse creditur. 'Is autem est qui gradu cognationis proxime de-

De Legg. xi. p. 983 D.

libro iv. Lege Mosis succedebat post fratres patruus, ut primo possessori propior quam fratrum filii. Num. xxvi. 10. [Imp. Gratianus, cui debebat imperium Theodosius, non erat pater Valentiniani junioris, sed frater, ut notum. Deinde Theodosius nequaquam ex animo grato erga defunctum arma cepit pro Valentiniano, sed amore Gallæ, hujus sororis. Vide capp. 43. et 44.

Libri iv. Zosimi, heic indicati. J. B.]

'Is autem est, qui gradu cognationis proxime defunctum attingit] Vide Deuter. xv. 11; xxiii. 7; Prov. xi. 17. Tractat hoc Servius ad illud Æneidos vi. (vera. 611):

Noc partem posuero sula —

Hierocles: ἢ δὲ τῶν ἀγχιστέων (τιμῆ) πρὸς τὴν τῆς φύσεως ἐγγύτητα παραμετρήσει τὴν θεραπείαν, τοσούτου τῆς

his children, it remains that the obligation be repaid to those to whom it is due in the next degree, though less due; that is, to a parent of superior degree and his children; especially since by that means it remains among the nearest relatives, both of the deceased owner, and of the person from whom the property came. So Aristotle.

X. 1 In newly acquired property, (the surplus beyond the patrimonial lot, of Plato) when the rule of repaying obligations fails, it remains that the succession fall to him who is believed to have been

- Orat. III. pp. 413, 417. functum attingit. Sic Isæus apud Græcos receptum ait, τοῖς ἐγγυτάτῳ γένους τὰ τοῦ τελευτήσαντος γεννήσασθαι, *defuncti bona ei cedere qui genere sit proximus*: addit: τί ἂν, τί δικαιότερον, ἢ τοῖς συγγενέσι τὰ τοῦ συγγενοῦς; *quid justius quam ut quæ cognati fuerant cognatis cedant?* Idem sensus est apud Aristotelem libri ad Alexandrum capite II. *Optime*, inquit Cicero, *societas hominum conjunctioque servabitur, si, ut quisque erit conjunctissimus, ita in eum benignitatis plurimum conferatur.* "Qui et alibi post liberos ponit bene convenientes propinquos, ut et Tacitus: *Liberos cuique ac propinquos suos natura carissimos esse voluit.* Idem Cicero alibi de cognatis agens: *Necessaria præsidia vitæ debentur his maxime.* Debentur scilicet non ex jure expletorio, sed κατ' ἀξίαν. Et alibi, cum de affectione erga propinquos egisset, *Ex hac animorum affectione*, subdit, *testamenta commendationesque morientium natæ sunt.* Idem copias nostras proximis quam alienis et suppeditari et relinqui æquius esse ait. Ambrosius quoque: *Est etiam illa probanda liberalitas, \*ut proximos seminis tui non despicias.*

2 Successio autem ab intestato, de qua agimus, nihil aliud est quam tacitum testamentum ex voluntatis conjectura. Quintilianus pater in declamatione: *Proximum locum a tes-*

μετὰ γονέας τιμῆς ἐκάστω τῶν συγγενῶν νέμουσα, ὅσον ἂν ἢ πρὸς ἐκείνους ἐγγύτης ὑποφαίνῃ. *Cura autem propinquorum mensuram suam accipiet a propinquitate naturali, ut post parentes tantum cognatorum cuique deferatur, quantum ad parentes propinquitatis exigit.* [In Aurea Carm. Pythag. vers. 4. pag. 46, 48. Ed. Needham] Possidius de

Augustino: *Justum et æquum esse videbat, ut a mortuorum vel filii, vel parentibus, vel affinibus magis possiderentur, hereditates scilicet, de quibus ibi agit.* (Cap. 24. Vit. Aug.)

\* Qui et alibi] Duo hæc loca ex Cicerone posterius producta, sunt ex eodem libro officiorum primo. (c. 17).

\* Ut proximos seminis tui non despi-

most dear to the deceased: and this is he who comes nearest to the deceased in the degree of relationship. So Isæus, Aristotle, Cicero, Tacitus, Ambrose. [This however is a moral claim, not a jural claim.]

2 The succession to intestate property, of which we here speak, is nothing but a tacit testament made out by conjecture of the late owner's will. So Quintilian. And what we have said of property newly acquired, will hold also of inherited property, if neither the persons from whom it came nor their children are extant.

XI. 1 The rules which we have given, though most consentaneous to natural conjecture, are, however, not necessary by Natural Law; and therefore by different causes, moving the human will, they vary by compacts, laws, customs. These in some cases allow one person to

*tamentis habent propinqui: et ita, si intestatus quis ac sine liberis decesserit. Non quoniam utique justum sit, ad hos pervenire bona defunctorum: sed quoniam relicta et velut in medio posita nulli propius videntur contingere.* Quod de bonis noviter quæsitis diximus, ea naturaliter proximis deferri, idem locum habebit in bonis paternis avitisque, si nec ipsi a quibus venerunt, nec eorum liberi existant, ita ut gratiæ relatio locum non inveniat.

XI. 1 Hæc vero quæ diximus quamquam naturali conjecturæ maxime sunt consentanea, non sunt tamen jure naturæ necessaria; ac proinde ex diversis causis voluntatem humanam moventibus, variari solent, pactis, legibus, moribus: qui subitionem in locum in nonnullis gradibus admittunt, in aliis non admittunt; alibi distinguunt, unde bona veniant, alibi id insuper habent. Est ubi primogeniti plus postgenitis ferunt, ut apud Hebræos: est ubi inter se sequantur. Est ubi agnatorum habetur ratio; est ubi cognati quilibet cum agnatis tantundem ferunt. Etiam sexus alicubi momentum habet, alicubi non habet: et alibi cognationis ratio habetur intra propiores gradus: alibi longius extenditur: quæ longum esset exsequi, nec instituti nostri.

2 Illud tamen tenendum est, quoties voluntatis expres-

*cia]* Ex Esaia sumtum lviii. 7. Paria habes apud Chrysostomum 1 Cor. iv. 7. et apud Augustinum *de Doctrina Christiana* Lib. xi. xii.

*]* In aliis non admittunt] Veteres Germanorum mores subitionem istam sive representationem ignorarunt etiam inter liberos: introduxit primus id jus in Franciam Childebertus edicto: in

Trans-Rhenanas partes Otho, Henrici filius: teste Withekindo Lib. ii. vide *legem Langobardicam* Lib. ii. tit. xiv. 18. Scoticum quoque jus vetus solam spectabat gradus proximitatem. Vide Pontanum *Danicorum* septimo, ubi narrat a rege Angliæ arbitro sumto ita pronuntiatum. (Pag. 378).

succeed in the place of another; in other cases, do not permit it; in others, make a distinction as to whom the property came from; in others, disregard this. In some cases the first-born take more than those born later, as among the Hebrews; in others, the shares are equal. In some cases the father's relatives only are reckoned; in others, the mother's relatives share equally with the father's. Sometimes the sex has its effect, sometimes it has not; sometimes account is had of cognation within the nearer degrees, in other cases it is extended further. It would be tedious and foreign to our purpose to follow these differences.

2 This rule we must hold by: that when there are no more express indications of will, it must be supposed that every one intended,



siora indicia nulla sunt, credi quemque id de sua successione statuisset quod lex aut mos habet populi, non tantum ex vi imperii, sed ex conjectura, quæ etiam in eos valet, quorum in manu est summum imperium. Nam et hi probabiliter creduntur in rebus suis æquissimum judicasse, quod aut legibus sanxerunt ipsi, aut moribus probant; in iis dico rebus, in quibus de nullo ipsorum damno agitur.

XII. Sed in regnorum successione distingui debent regna, quæ pleno modo possidentur, et in patrimonio sunt, ab his quæ modum habendi accipiunt ex populi consensu: quo de discrimine egimus supra. Prioris generis regna <sup>a</sup>dividi possunt etiam inter mares <sup>a</sup>et feminas, ut in Ægypto et Britannia olim factum videmus:

<sup>a</sup> *Dividi possunt etiam inter mares*] In Asia fratres simul regnabant, sic et uni præcipuum esset jus diadematis. Polybius Exc. legationum XCIII. Invenies et apud Livium (XLIV. 19; XLV. 11) eundemque Polybium, (*Excerpt. leg.* 89) Ægyptum inter fratres Ptolemæos divisam. Filii Attilæ gentes sibi dividi æqua sorte poscebant: Jornandes *de Rebus Gothicis*. (cap. 50). Gregoras Lib. VII. de Irene Andronici Palæologi uxore: τὸ δὲ καινότερον, ὅτι οὐ μοναρχίας τρόφι κατὰ τὴν ἐπικρατήσανσαν Ῥωμαίοις ἀρχῆθεν συνήθειαν, ἀλλὰ τὸν τρόπον λατινικόν, διανεμαμένους τὰς Ῥωμαίων πόλεις καὶ χώρας, ἀρχειν κατὰ μέρος τῶν υἱῶν ἕκαστον, ὡς οικεῖον κλῆρον καὶ κτήματος τοῦ λαχόντος, ἐκ πατρῶν μὲν ἐς αὐτοὺς κατὰ τὸν ἐπικρατήσαντα νόμον ταῖς περιουσίαις καὶ κτήσεσι τῶν βαναύσων ἀνθρώπων κατιόντος, παραπεμπομένου δ' ἕπειθ' ὁμοίως εἰς τοὺς ἐφεξῆς πατ-

δας καὶ διαδόχους. λατίνων γὰρ οὐσα γέννημα καὶ παρὰ τούτων εὐληφεία τουτὶ τὸ νεώτερον ἴθος, ἐπάγειν ἐβούλετο. *Quod maxime mirandum erat, voluit ut non unus imperaret, secundum morem Imperii Constantinopolitani veterem, sed adinstar principum in Occidente civitates et regiones dividerentur in singulos filiorum, ut sic regnum tanquam proprium cuiusque patrimonium a patribus ad ipsos perveniret, ita ut in plebeiorum hominum bonis fieri solet, ac sic perpetuo ad cuiusque liberos heredesque descenderet. Ipsa enim cum ex occidentis partibus ortum haberet, morem, quem ab ipsis acceperat, huc sine exemplo introducere animo agitabat.* (Pag. 106. Edit. Genev.)

<sup>a</sup> *Et feminas, ut in Ægypto et Britannia*] De Alexandro et Laodice vide Polybium excerptis legationum CXL. de Auletæ filia Strabonem XVII. (pag. 796.) In Asia post Semiramidem femi-

with respect to his own succession, that which the law or custom of the people directs: and this, not only from the force of the authority of the State, but from conjecture of what the person's will was. And this is to be held good also of the persons who have the sovereign authority. For they are probably believed to have judged in their own case that which is most equitable, which is what they have established as law or sanctioned as custom.

XII. In the Succession to kingdoms, we must distinguish the kingdoms which are held by plenary possession and which are patrimonial, from those which are held in some way involving the consent of the

Nulla discrimine sexus  
Reginam scit ferre Pharos.

Ait Lucanus: de Britannis Tacitus, *Neque enim sexum in imperio discernunt.* Nec adoptati minus veris liberis succedent ex præsumpta voluntate; sic Æpalio Locrorum regi Hyllus Hercules filius per adoptionem in regnum successit. <sup>9</sup> Molossus <sup>b</sup> nothus ex patris Pyrrhi, legitimis liberos non habentis, iudicio successit in regnum Epiri: de adoptando in successionem Scythiæ Philippo egit rex Atheas: Jugurtha nothus, sed adoptatus, successit in regno Numidico: sicut et in regnis quæ Gothi, et Langobardi armis quæsierant, adoptionem valuisse legimus. Imo etiam ad eos proximos ultimi possessoris regnum perveniet, qui primum regem sanguine non attingunt, si

Phars. x. 91.  
Vit. Agric. 16.

Strabo ix. p. 497.

Paus. 1.

Just. ix. 2.

Sall. Bell. Jug. c. 10, 11, 25.

Cam. Chron. Paul. Diac. Lib. vi. de Gest. Lang.

nas regnasse plures narrat Arrianus *αβαβάροι.* (Lib. 1. c. 24.) Talis Nitocris Babylone, Artemisia Halicarnasæ, Tomyris apud Scythas. Servius ad primum *Æneidos* (vers. 654): *Quia ante etiam femina regnabant.* Idem apud Rutulos obtinuisse docet ad ix. *Æneidos* (vers. 654). [De Feminarum successione in regnum, ut putatur, apud Assyrios, vide Conrad. Samuel Schurzfleisch. Disp. LVIII. pag. 28, et seqq. J. B.]

<sup>9</sup> In ora libri Auctor heic testem indicat Pausaniam, Lib. 1. Locus est cap. xi. Sed non satis accurate, quæ in eo legerat, retulit. Nam I. Molossus non erat filius nothus Pyrrhi, sed major natu trium liberorum susceptorum ex Andromache, quam pro legitima uxore habuerat, ut ait Servius in *Æn.* III. 297. II. Non dicit Pausanias, Molossum, deficientibus liberis legitimis, a Pyrrho heredem regni institutum: sed Helenum, filium Priami, post mortem

Pyrrhi, uxore ducta Andromache, Pyrrho in regnum successisse, quod moriens ipse Molosso reliquit. J. B.

<sup>b</sup> *Nothus*] Apud Tartaros nothi et legitimi pares. De Persis vero Herodotus: *νόθον δὲ σφί νόμος ἐστὶ βασιλεύσαι, γνησίου πατέριος. Μὸς non est illis ut nothus regnet dum legitimus aliquis reperitur.* (Lib. III. c. 2). In Hispania Wandali regnarunt duo, Gontharis legitimus, Gizerichus nothus Godigiscli teste Procopio (*Vandalic.* 1. 3) ex Septentrionalium nimirum gentium more veteri, cujus testes Adamus Bremensis *Historia Ecclesiastica* c. 106. Helmoldus *Slavicus* Lib. 1. c. 51 et 52. Michaeli Thessaliæ domino successit legitimis deficientibus nothus Michael. Gregoras Lib. II. (pag. 22.) Huic itidem nothus successit ex parte: idem Gregoras Lib. IV. (Pag. 52. *Ed. Genev.* 1616). De Molosso Pyrrhi notho vide Servium ad III. *Æneidos.* (vers. 297).

people. Of which difference we have spoken above.

Kingdoms of the former kind may be held by males or females: as formerly in Egypt and in Britain. See Lucan and Tacitus. And adopted as well as real children succeed in such cases, from presumption of the will. So Hyllus the adopted son of Hercules succeeded Æpalius; Molossus succeeded Pyrrhus; Atheas [Ateas, Gronov.] would have taken Philip for his successor; Jugurtha succeeded to the kingdom of Numidia; and so in the kingdoms of the Goths and Lombards adoption prevailed. Even the kingdom shall pass to those relatives of the last possessor who have no connexion by blood with

talis successio in iis locis recepta sit: sicut Paphlagoniam regum domesticorum interitu hæreditariam patri suo obvenisse ait, apud Justinum, Mithridates.

Lib. xxxviii.  
A.

XIII. Quod si dictum sit ne dividatur regnum, nec cui cedere debeat expressum sit, <sup>c</sup>ut quisque natu est maximus, mas aut femina, regnum habebit. In Thalmudico titulo de regibus legitur: *Qui præcipuum jus habet in hæreditate, is et in possessione regni. Ideo filius natu major præfertur minori.* Νομιζόμενον πρὸς πάντων ἀνθρώπων τὸν πρεσβύτατον τὴν ἀρχὴν ἔχειν, inquit Herodotus: *Mos omnium populorum est, ut natu maximus imperium habeat.* Idem alibi sæpe νόμον legem sive consuetudinem regnorum hoc vocat.

Lib. vii. 2.

Lib. xxi. 31. Livius duorum fratrum Allobrogum de regno contententium minorem ait jure minus, vi plus potuisse. Apud Trogum Pompeium, *Artabasanus maximus natu ætatis privilegio regnum sibi vindicabat: quod jus et ordo nascendi, et natura ipsa gentibus dedit.* Idem alibi jus gentium vocat: ut et Livius, qui et ordinem appellat ætatis atque naturæ, quod intelligi nisi

Just. ii. 10.

Lib. xl. 11. <sup>c</sup> *Ut quisque natu est maximus*] De Suedis vide Brigittam iv. 3. De Danis Saxonem XII. et XIII. Appianus Mithridatico: δικαιούντα τὸν πρεσβύτερον ἀρχεῖν: (pag. 178.) Ἐξῆς judicabat regnum esse natu maximi. Nicetas Choniates Joanne Comneno: ἡ φύσις τοῖς πρωτοτόκοις παισὶ τῆ τάξεϊ ἐμμένονσα τὰ πρωτεῖα βραβεύειν εἰωθε. παρὰ δὲ Θεῷ οὐχ οὕτως ἐν ταῖς τῶν προβλήσεων μεγίσταις αἰ φιλεῖ γινέσθαι. *Natura quidem suum sequens ordinem primum natos honorat. At Deus non semper in maximis privilegiis eum ordinem insistit.* (Cap. 12). Idem Ma-

Lib. xl. 11.

nuele de Isaacio loquens: ἀπὸ γενέσεως εἰς τὴν διαδοχὴν τῆς βασιλείας καλούμενος. *Nascendi ordine ad regni successionem vocatus.* (Lib. i. c. 1). Apud Josephum Antipater dicebat, Hyrcani ἀρχὴν εἶναι διὰ τὸ πρεσβεῖον. *Principatum esse ob nascendi ordinem.* (Bell. Jud. Lib. i. cap. vi. § 2. Edit. Hudson.) vide et Leunclavium *Turcicorum* xvi.

<sup>1</sup> Confer, de tota ista materia successionis in regna, PUFENDORFIUM, *De Jure Nat. et Gent.* Lib. vii. cap. 7. § 11. et seqq. J. B.

<sup>d</sup> *Ni aliud lex aut mos ferat*] Dardanus et Jasius pariter in Troja regnarunt

the first king (the source of the royal stock), if such succession be received in the country in question. Thus Mithridates, in Justin, says that his father received Paphlagonia by inheritance, the line of domestic kings being extinguished.

XIII. If it be directed that the kingdom is to pass undivided, but not to whom it is to go, the eldest child, male or female, will take it. See the Talmud on kings, Herodotus, Livy, Trogus Pompeius. This is called *jus gentium*, the order of age and of nature. But he or she who succeeds in such a kingdom is bound to provide a satisfaction for the coheirs, instead of their share of the power, if, as and as far as, it can be done.

pater aliud jusserit, ut Ptolemæus apud eundem Trogum. Qui Lib. xvi. 2. autem in regno tali succedit, coheredibus tenebitur pro ipsorum partibus æstimationem rependere, si et quatenus id fieri potest<sup>1</sup>.

XIV. At ea regna, quæ populi libero consensu facta sunt hereditaria, ex præsumta populi voluntate deferuntur. Præsumitur autem populus id voluisse quod maxime expedit. Hinc primum illud nascitur, ut <sup>d</sup>ni aliud lex aut mos ferat (sicut Thebis Bœotiis reguum fuisse inter mares dividuum ex <sup>e</sup>Zethi et Amphionis, itemque ex CEdipodis filiorum historia apparet, et vetus <sup>2</sup>Attica inter Pandionis liberos divisa est; et quæ <sup>3</sup>circa Rhodum inter Camirum, Jalysum, Lindum fratres; et regnum Argivum inter quatuor Persei filios) individuum sit regnum, quia id ad tuendum regnum et civium concordiam plurimum valet. Justinus libro XXI. *Firmissimum futurum esse* Cap. l. n. 2. *regnum, si penes unum remansisset, quam si portionibus inter plures filios divideretur, arbitrabantur.*

XV. Alterum, ut successio stet intra eos qui descendunt a primo rege: ea enim familia ob nobilitatem electa censetur,

Servius ad illud *Æneidos* (III. 15): *Sociique penates*. In Creta Minos et Rhadamanthus. Julianus *contra Christianos*. (Pag. 190 D. Ed. Spanh.) Albus Numitor et Amulius, ut quidam ait scriptor de Viris illustribus. (c. 1.) Alii enim Numitori pecunias, regnum Amulio cessasse alunt, ut Plutarchus: (in Rom. p. 19 A.) sicut et Eteocli regnum Thebanum, Polynici ejus loco monile Hermiones obvenisse quidam prodidere. [Vid. Scholiasten Euripidis, in *Phœniss*. vers. 71.] Pari modo in Norvagia alteri regnum, alteri naves et spes ex maritinis

expeditionibus.

<sup>e</sup> *Zethi et Amphionis*] Euripides *Hercule Furente* (vers. 29):

Τῶ λευκοπαλῷ πρὶν τυραννίσσαι χθονὸς  
Ἄμφιον' ἢδὲ Ζῆθρον, ἐκγότῳ Διός.

Regnum priusquam venit ad claros equis  
Amphionem Zethumque, prognatos Jove.

<sup>2</sup> Divisio veteris Regni Athenarum spectabat agros, non autem imperium, quod uni manebat, ut Auctor ipse supra observavit, in Nota ad Cap. III. hujus libri, § 4. *J. B.*

<sup>3</sup> Refert id PINDARUS, *Olympion*. VII. 135, et seqq. *J. B.*

XIV. Those kingdoms which have become hereditary by the free consent of the people, are transferred according to the presumed will of the people. The people are presumed to will what is most expedient. Hence it follows, in the first place, that the kingdom passes undivided, because that arrangement is of great use to preserve the state and the concord of the citizens. So Justin: except law or custom ordain otherwise, as at Thebes, the kingdom was divided between the males; and ancient Attica among the sons of Pandion; and Rhodes; and Argos. [See.]

XV. Another rule is, that the succession remains among those who are descended from the first king: for that family is conceived to be

Cap. vii. n. 15. eaque finita regnum redire ad populum. Curtius libro x. *In eadem domo familiaque imperii vires remansuras esse: hereditarium imperium stirpem regiam vindicaturam: assuetos esse ipsum nomen colere, venerarique: nec quenquam id capere nisi genitum ut regnaret.*

XVI. Tertio, ne succedant nisi qui nati sunt secundum patriæ leges: non naturales tantum, quia ad contemptum patent, quorum matrem pater justo conjugio dignatus non est, et præterea quia minus certi habentur: at in regnis expedit populo haberi maximam certitudinem, quæ haberi potest ad vitandas controversias: quæ causa fuit cur Macedones Demetrio minori  
Liv. xxxix. 53. potius quam Perseo majori regnum debere existimaverint, quod Demetrius justa matrefamilias natus esset. Et apud Ovidium legimus:

At ne nupta quidem, tædæque accepta jugali:  
Cur, nisi ne caperes regna paterna nothus?

Sed nec adoptivi, quia nobilitas generis vere regii magis reverendos efficit reges, majorque de eis spes concipitur:

Hor. Od. iv.

Est in juvenis, est in equis patrum  
Virtus.

XVII. Quartum, ut inter eos, qui pariter in hereditatem admitterentur, sive quia unius sunt gradus, sive quia in paren-

<sup>†</sup> *Præferantur mares feminis*] Vide *Nicetam Choniatem Manuële*, libro iv. (Cap. 4.)

<sup>‡</sup> *Præferatur natus maximus*] Homerus de regno Cretensi *Iliad. N.*

Ἡμῶν δ' ἀμφοτέροισιν ὁμῶν γένος, ἧδ' ἴα πατρῴη,

Ἀλλὰ Ζεὺς πρότερος γαγόνει καὶ πλείονα ἦδη.

Nostrum utrique solum patrium fuit et genus unum, Jupiter at senior rerumque peritior idem.

(Vers. 354.) Ubi sapienter Homerus, ut solet, causam reddidit, cur majores nati in regnis prælati, valentem ἐπὶ τὸ πολὺ, ut plerumque, id enim in talibus sufficit: τοῦ νόμου τῷ πρεσβυτέρῳ

elected for its nobility, and when it fails, the kingdom to return to the people. So Curtius. [See.]

XVI. In the third place, that none succeed except those who are born according to the laws of the country: not natural children, who are open to contempt, since their father did not deem their mother worthy of a legitimate marriage, and besides, as being less certain. For in kingdoms it is expedient for the people that there should be the greatest possible certainty, to avoid controversies. So Demetrius in Macedon was taken, rather than Perseus. So says Ovid. Also not adoptive children, because the nobility of the race makes kings more revered, and turns more hope to them. So Horace. [See.]

XVII. In the fourth place, that among those who are admitted

tum suorum gradum succedunt, præferantur mares feminis : ideo quod mares tum ad bella, tum ad alias imperii partes magis idonei feminis censentur.

XVIII. 1 Quintum, ut inter mares, aut inter feminas ubi mares deficiunt, præferatur natu maximus ; quod is iudicio aut perfectior jam esse, aut prius futurus creditur. Cyrus apud Xenophontem : τὸ προηγείσθαι προστάτω τῷ προτέρῳ γενομένῳ, καὶ πλείονων κατὰ τὸ εἰκὸς ἐμπείρῳ Cyrop. viii. 7. § 3. imperium relinquo majori natu, ut quem par est rerum esse peritiorum. Quia vero hæc ætatis præstantia temporaria est duntaxat, sexus autem perpetua, ideo sexus prærogativa potior est quam ætatis. Sic Herodotus, cum dixisset Andromedæ Lib. vii. 61. filium Persam Cepheo in regnum successisse, causam reddit : ἐτύγχανε γὰρ ἅπαις ἐὼν ὁ Κηφεὺς ἔρσενος γόνου· nullos enim Cepheus habebat liberos mares. Et, Diodoro narrante, Lib. iv. 33. p. 167. Teuthras Mysiæ regnum filis Argiopæ reliquit ἅπαις ὧν ἀρρένων non habens mares liberos. Sic Trogus dixit ad filiam Just. l. 4. pertinuisse Medorum imperium ; quod nullum Astyagi virilis sexus genus erat. Similiter Cyaxares apud Xenophontem Mediam filis suæ deberi : οὐδὲ γὰρ ἔστι μοι, inquit, ἄρρῆν Cyrop. viii. 8. § 3. παῖς γνήσιος, neque enim est mihi legitimus filius mas. De Latino rege Virgilius (*Æn.* vii. 50. et seqq.) :

Filius huic fato divum prolesque virilis

Nulla fuit, primaque oriens erepta juventa est :

Sola domum et tantas servabat filia sedes.

τῶν βασιλέως παίδων δίδοντας τὴν τῶν ἄλλων ἡγεμονίαν, ait Zosimus libro 11. (Cap. 27. Ed. Cellar.) de Persarum lege : cum lex daret e regum filiis natu maximo summam rerum. Periander in

regnum Corinthiorum patri successit κατὰ πρεσβείον, ordine nascendi. Ita Nicolaus Damascenus in excerptis, quæ beneficio viri maximi Nicolai Peirescii habemus. (Pag. 450.)

alike into the inheritance, whether as being of the same degree, or as succeeding in the place of their parents, males are preferred to females ; because males are more fitted both for war and for other parts of government.

XVIII. 1 Fifthly, that among males, and among females when the males fail, the elder is preferred, because he is either more mature in judgment, or will sooner be so. So Cyrus in Xenophon. But because this superiority of age is only temporary, while that of sex is perpetual, the prerogative of sex is stronger than that of age. So Herodotus, Diodorus, Trogus, Xenophon, Virgil. So at Lacedæmon, Sparte the daughter of Eurotas succeeded, and her children ; and the children of Helen, to Tyndareus, because there were no male children. And

Paus. III. 1.

Sic ante Heraclidarum imperium apud Lacones Eurotæ successit Sparte filia, aut ejus liberi, ut Tyndareo Helenæ liberi, quia mares filii non extabant; et Eurystheo in Mycenarum imperium successit Atreus ejus avunculus, notante Thucydide. Eodem jure regnum Athenarum <sup>h</sup>ad Creusam, Thebanum <sup>4</sup>ad Antigonem pervenisse notatur, quod mares deficerent. Et regnum Argolicum ad Argum Phoronei <sup>1</sup>ex filia nepotem.

Lib. I. 9.

2 Unde et illud intelligere datur, quanquam liberi nonnullis gradibus parentum præmortuorum vicem impleant, id tamen duntaxat intelligendum, ut capaces sint juxta ceteros, salva tamen sexus primum, deinde ætatis prærogativa inter capaces. Nam qualitas et sexus, et ætatis, quatenus in hac re a populo consideratur, ita personæ adhæret ut avelli inde nequeat.

XIX. Quæritur an regnum, ubi hunc in modum defertur, pars sit hereditatis. Et verius est esse <sup>k</sup>hereditatem quandam, sed separatam ab aliorum bonorum hereditate, qualis hereditas peculiaris in feudis quibusdam, emphyteusi, jure patronatus, et

<sup>h</sup> Ad Creusam] Vide Euripidem *Ione* (vers. 72, 73, 578).

<sup>4</sup> Vide EURIPIDEM, *Phœniss.* vers. 1580, et seqq. 584, et seqq. J. B.

<sup>1</sup> Ex filia nepotem] Et si sine stirpe

mortuus fuisset Orestes, in eodem regno Argolico successisset ei Electra, ut ex Euripidis *Taurica Iphigenia* (vers. 681, 695, et seqq.) discimus. Sic Calydonis regnum pervenit ad Andræmona Oeni

Eurystheus was succeeded by his uncle Atreus. By the same right the kingdom of Athens passed to Creusa, that of Thebes to Antigone, because the males failed: and the kingdom of Argos went to Argus the grandson of Phoroneus through his daughter.

2 Whence it is to be understood that although children in some degrees fill the place of parents who have died, that is to be understood, so as that they are capable of ruling compared with others, and saving the prerogative, first of sex, and then of age. For the quality of sex and of age, so far as in this matter they are considered by the people, adheres to the person, so that it cannot be separated from it.

XIX. It is made a question whether a kingdom, when thus transferred, is a part of the inheritance. And the more true opinion is that it is a certain kind of inheritance, but distinct from the inheritance of other property; such an inheritance as is seen in some fiefs, in leases, in the right of patronage, in priority of legacy. Whence it follows that the kingdom pertains to him who may take the property as heir if he choose to do so; but in such a way that it may be taken without the property and its burthens. The reason is, because the people is

jure præcipui quod dicitur, conspicitur. Unde sequitur, ut regnum ad eum pertineat, qui et bonorum heres esse possit si velit, sed ita ut etiam sine bonis et eorum onere possit adiri. Ratio est, quia populus regnum voluisse creditur quam optimo jure deferri; nec quicquam ejus refert hereditas a rege adeatur necne, cum hereditarium ordinem non ob hoc elegerit, sed ut certi quid esset, et reverentia conciliaretur ex sanguine: simulque ex genere et educatione spes esset præclaræ virtutis, et regni possessor regnum magis curaret animosiusque defenderet, si id ipsum iis esset relicturus, quos ipse ob acceptum beneficium aut ob caritatem maximi faceret.

XX. Ubi vero mos succedendi diversus est in allodiis et feudis, si regnum non sit feudale, aut certe primitus non fuerit, etiamsi postea hominum pro eo præstetur, succeditur ex lege, qua in allodiis succedebatur tempore regni instituti.

XXI. In iis autem regnis, quæ primitus data sunt in feudum ab eo, qui plene dominus erat, sequenda erit lex successionis feudalis; non semper Langobardica illa quam per-

generum, [Apollodor. i. 8. 6]. Asterii regnum ad generum Minoa, ut refert Apollodorus (III. 1. 3), addita causa quod liberi mares nulli essent.

<sup>k</sup> *Hereditatem quandam*] Putavit

Innocentius III. talis regni successionem amitti ab eo qui ultima defuncti mandata non impleverit. c. licet. 6. de voto. [*Decretal.* III. 33. Sed male. Vide quæ diximus in Notis Gallicis.]

supposed to wish that the kingdom should be transferred by the best right possible; nor is it their concern, whether the king accept the inheritance of the property or not; since they chose the hereditary order of succession, not that the heir of the ordinary property should have it, but that the order might be certain, and might carry with it the reverence given to the blood; and also that from the habits of the race and their education, there might be the hope of good moral qualities: and that the possessor of the kingdom might bestow more care on the kingdom, and defend it with more energy, since he was to leave it to those whom he most wished to benefit for benefits received, or from natural affection.

XX. But when the rule of succession is different in *allodial* and in *feudal* property, if the kingdom be not a *fief*, or certainly was not so at first, even though *homage* have been done for it; the succession is by the law which regulated allodial property when the kingdom was instituted.

XXI. But in those kingdoms which were given as *fiefs* by a person who had plenary ownership, the law of feudal succession is to be followed: not however always the Lombardic law which we have in



scriptam habemus, sed quæ in gente quaque recepta fuit, quo tempore data est prima vestitura. Nam Gothi, Vandali, Hunni, Franci, Burgundiones, Angli, Saxones, nationes omnes Germanicæ, qui partes optimas imperii Romani bello occuparunt, suas singuli leges aut mores de feudis, non minus quam Langobardi, habuerunt.

*Cognatica.*

§ *Sub Cond. 4.*  
*Inst. de F. O.*

XXII. 1 Frequens autem in regnis est alia quædam successio, non hereditaria, sed quæ <sup>1</sup>linealis dicitur; in qua observari solet non jus illud subitionis in locum quæ repræsentatio dicitur, sed jus transmittendi futuram successionem, quasi delatam, lege scilicet ex spe, quæ nihil ex se et naturaliter operatur, jus quoddam verum excitante: quale scilicet jus est <sup>m</sup>in his, quæ ex stipulatione conditionata debentur: ita ut hoc ipsum jus in posteros, ex primo rege venientes, necessario transeat, sed ordine certo, ut primum vocentur liberi ultimi possessoris primi gradus, tam qui vivunt, quam qui mortui sunt: tum vero inter vivos et mortuos ratio habeatur sexus

<sup>1</sup> *Linealis*] Vide Cardinalem Tuschum *Pract. Concl.* 88: verbo *regni successio*: Guillelmum de Montisferrato de successioibus regum, qui liber est in Oceano Juris. Peregrinum *De Jure Fiscis*, Lib. i. tit. 11. n. 48. et Lib. v. tit. 1. n. 109. Vide exempla talis successionis in Norvagico regno apud eruditissimum summæque diligentis virum Johannem Pontanum *Historia Danica* libro ix. (Pag. 514, 515) consuetudinibus Normanniæ de propinquitate

heredum: et apud Johannem Serranum in Ludovico Grosso, super controversia Borboniensis. Argentæus *Historia Britannica*, libro vi. c. 4. *In successioibus liberi primogeniti, sive sint masculi aut femellæ, et similiter liberi secundogenitorum, si primogeniti absque liberis ex proprio corpore decesserint, in successione feudorum jure primogenitura representant personas patrum suorum, et veniunt ad talia jura successionum et primogenitura, sicut eorum patres*

the law-books, but that which was received in each nation at the time of the first investiture. For the Goths, Vandals, Huns, Franks, Burgundians, Angles, Saxons, all the Germanic nations which occupied the best parts of the Roman empire, had each their own laws or customs concerning fiefs, as well as the Lombards.

XXII. 1 But there is another succession frequent in kingdoms, called *Lineal*; in this, the rule observed is, not that of the representation of the heir by his progeny, but the heir transmits the future succession, [even if he die before he succeed himself] the law founding a true right upon an expectancy which of itself produces no effect; [see the illustration from the Civil Law;] so that this right passes to his posterity who are descended from the first king: but according to a certain order; so that there are first called in the children of the last possessor of the first degree, both those who are alive and those who are dead: and among those alive and dead account is had, first of sex,

primum, deinde ætatis: Mortuorum autem jus si prævaleat, transeat ad eos qui ab ipsis descendunt, pari rursus inter pares prærogativa sexus, ac deinceps ætatis, salvaque semper transmissione mortuorum in vivos, vivorum in mortuos. Si liberi ejus desint, venit ad alios qui proximi sunt, aut, si viverent, essent, simili transmissione et inter pares in eadem linea observato discrimine sexus et ætatis, ita ut ob sexum et ætatem nunquam transeat de linea in lineam. Cui consequens est ut filia ex filio præferatur filio ex filia, et filia ex fratre filio ex sorore, item filius majoris fratris fratri minori, atque ita in cæteris. Hæc est successio regni Castellæ; ad cujus exemplum etiam majoratus jura in eo regno constituta sunt.

2 Successionis autem hujus linealis argumentum, si lex et exempla desint, sumi poterit ex ordine qui in publicis cœtibus servatur. Nam si in eo ratio habeatur linearum, id signum erit spem a lege in jus animatam, ita ut a morien-

*si viverent, eorum patruos, avunculos excludendo, secundum generalem et notoriam consuetudinem, tam in successionebus per rectam lineam, quam a latere obvenientibus: et de usu et consuetudine ante dicta filia succedit in feudis, sive sint Ducatus, Comitatus, Perrie, aut Baronie, quantumcunque magni et nobiles, et quod ita evenerat in Comitatus Artesii, Campania, Tolose, et Britannie. Talis ordo succedendi præscriptus*

Marchæ Mantuanæ ab Imperatore Sigismundo anno 10000 XXXII. Et a Carolo Quinto Imperatore, et rege Hispaniæ Philippo II. in regnis suis ac principatibus, annis 10000 LIV. et 10000 xciv.

<sup>m</sup> *In his, quæ ex stipulatione conditionata debentur*] Item in legatis, quorum dies cessit, non venit. [Vid. L. v. princ. D. Quando dies Legat. etc.]

Covar. l. 2.  
Pract. q. c.  
38. num. 6.  
Molin. de  
Prim. Hosp.  
cap. 8.

then of age: and if the right of the dead be superior, it passes to those who descend from them, with the like prerogative, first of sex, and then of age; and preserving at every step the right of transmission from the dead to the living, and from the living to the dead. If the children of any branch fail, the succession passes to the next who are nearest of kin, or would be if they were alive, by a similar transmission, and observing in those of the same branch the same distinction of sex and age; so that transition is never made, on account of sex or age, from one line to another. It follows from this, that a son's daughter is preferred to a daughter's son, and a brother's son to a sister's son, and an elder brother's son to a younger brother, and so in other cases. This is the succession of the kingdom of Castile: and the same rule holds with regard to *majorats* in that kingdom.

2 An argument for this lineal succession, if law and example be wanting, may be taken from the order of public assemblies; [such as a House of Peers.] For if in such cases also account is had of

tibus in superstites transeat. Hæc autem est successio linealis cognatica, in qua fœminæ et fœminis nati non excluduntur, sed postponuntur in eadem linea, ita ut etiam regressus ad eas sit, si propiores aut pares cetera mares aut ex maribus defecerint. Fundamentum autem hujus successionis, quatenus ab hereditaria differt, est spes populorum de optima educatione eorum, qui spem regni habent justissimam; quales sunt quorum parentes si viverent essent successuri.

XXIII. Est et alia linealis successio agnatica, duntaxat marium ex maribus; quæ ex nobilissimi regni exemplo successio juris Francici vulgo appellatur. Hæc quatenus a cog-

▪ *Successio juris Francici*] Vetus testimonium moris hujus Francici habes apud Agathiam libro II. (Cap. 7). Eadem fuit successio in Davidis stirpe post Solomonem. Vide 2 Paralip. xiii. 3.

◦ *Ubi deficiente agnatica substituitur successio cognatica*] Ut in Provincia Narbonensi. Vide Serranum, *Carolo VII. (de Comitatu Commingensi, pag. 322, 323. Edit. Paris. 1627)*. Ex tali credo lege Theudericho sine liberis defuncto sororis filius Athalaricus successit. [PROCOR. *Gothic. L. I. c. 2.*] Videtur et in Arragonia id olim valuisse.

¶ *Posnati et alii successionum modi introduci*] Apud Æthiopes olim regibus succedebant sororum filii, narrante Nicolao Damasceno. (pag. 518. *Excerpt. Peiresc.*) Idem apud Pictos usurpatum, semperque successisse cognatos per feminas notat Beda. Tacitus *de Germa-*

*nis: Sororum filius apud avunculum idem, qui apud patrem, honor. Quidam sanctiorem arctioremque hunc nexum sanguinis arbitrantur. (Germ. c. 20.)* Apud Indos quosdam idem fieri docet nos Osorius, et alii.

¶ *Ut qui sibi quoque tempore futuri sunt proximi*] Id in Africa obtinuit ex Gizerichi testamento. Procopius *Vandalicorum* primo: χρόνον δὲ ὄλιγον Γιζέριχοι ἐπιβιοῦσι τελεῖσθαι, κέρρειον ἢ δὴ ἡλικίας ἦκων, διαθήκαται διατιθέμενος, ἐν αἷσι ἄλλα τε πολλὰ βασιλοῖσι ἐπέσκηψε, καὶ τὴν βασιλείαν δὲ βασιλῶν εἰς τοῦτον λείπει, ὅτι ἂν ἐκ γόνου ἄρρενος αὐτῶ Γιζέριχος κατὰ γένος προσήκων, πρῶτος ἂν ἀπέδντων τῶν αὐτοῦ συγγενῶν τὴν ἡλικίαν τύχοι. Aliquanto post tempore Gizerichus obiit, multa jam ætate, facto testamento, quo tum multa alia præceperat Vanda-

lines of descent, that will be a sign that expectancy is by the law vivified into a Right, so that the succession passes from the dead to the survivors.

This is a *Cognatic* lineal succession, in which women and the sons of women are not excluded, but are postponed in their own line; but yet so that there is a regress to them, if there be a failure of claimants nearer, or equal in other things, who are males, or from males.

The foundation of this succession, so far as it differs from the hereditary, is the hope entertained by the people as to the good education of those who have the legitimate hope of the kingdom: and such are they whose parents, if they had lived, would have succeeded.

XXIII. There is also an *Agnatic* lineal succession, of males to males only; which, obtaining in a certain noble kingdom, is called

natica differt in hoc maxime introducta est, ne per fœminarum matrimonia ad peregrinum sanguinem imperium deveniret. In utraque autem lineali successione in infinitum admittuntur etiam qui ab ultimo possessore remotissimo gradu distant, dum a primo rege descendant. Est et °ubi deficiente agnatica substituitur successio cognatica.

XXIV. <sup>P</sup>ossunt et alii successionum modi introduci, aut populi voluntate, aut etiam ejus qui regnum ita in patrimonio habet, ut alienare possit. Licet enim exempli causa constituere, <sup>q</sup>ut qui sibi quoque tempore futuri sunt proximi succedant in regnum, sicut apud Numidas olim, puto tali

Liv. xxix. 22.

*lis, tum regnum Vandalicum semper venire voluit ad eum qui per lineam masculinam ipsi Gizericho genere proximus, et inter proximos maximus esset ætate.* (Cap. vii.) Jornandes: *Gizerichus, diu regnans, ante obitum suorum filiorum agmine accito ordinavit, ne inter ipsos de regni ambitione esset dissensio, sed ordine quisque et gradu suo aliis superveniret, id est seniori suo filio fieret sequens successor, et rursus ei posterior ejus.* (Cap. 33.) Victor Uticensis Lib. II.: *Cui secundum constitutionem Gizerichi regis, eo quod major omnibus esset, regnum inter nepotes potissimum debebatur. Hic semper spectatur non possessor ultimus, sed primus regni acquisite: quod succedendi genus ex ipsa Africa sumserit Gizerichus, ubi id valuisse in textu ostendimus, an vero a quibusdam Septentrionis nostri populis, dubitari*

potest. Nam et apud Langobardos Vaaci regi filios relinquenti non aliquid filiorum succedere debebat, sed ejusdem generis Rislulphus: testis Procopius *Gotthicorum* III. (cap. 35.) Et in Hungariis regnum mortuo Iatra non liberis ejus sed fratri jus fuisse narrat Nicetas Choniates *de rebus Manuelis* libro IV. (cap. i.) Nescio an eodem pertineat recepta apud Patzinacitas successio, sed obscurius proposita a Constantino Porphyrogenneto *de Administratione Imperii* c. xxxvii. In Dania idem observatum tradit Crantsius *Danicorum* IV. et *Suedicorum* V. Etiam Albæ successit Ænæs non Iulus Ascanio majore filio Ænæsæ natæ, sed alter filius Ænæsæ Silvius. [Vide Dion. Halicarn. *Antiq. Rom.* Lib. I. c. 70. et Aurel. Victor. *de Orig. Gentis Romanæ.* c. 17.]

*Frank Law* [or *Salic Law.*] This, so far as it differs from the cognatic, was introduced mainly with this view, that the empire might not pass to foreign blood by the marriages of the female branches.

In both these lineal successions, those are admitted who are distant even in the most remote degree from the last possessor, provided they descend from the first king.

There are some cases when, failing the agnatic succession, the cognatic is substituted.

XXIV. Other modes of succession also may be introduced according to the will of the people, or by the will of the patrimonial sovereign. For instance, he may settle that those who on each occasion are nearest to himself, [see Grotius's note] should succeed to the kingdom: as amongst the Numidians formerly, I suppose by some such

ex causa, fratres liberis ultimi possessoris præferbantur. Idem in Arabia Felice usurpatum olim fuisse ex Strabone colligo. De Taurica Chersoneso idem recentiores prodidere: nec ita dudum est cum <sup>r</sup>apud Afros Maroci et Fessæ reges idem est factitatum. Atque hoc in dubio observandum in fideicommisso quod familiæ relinquitur, verior est sententia, Romanis quoque legibus congruens, quanquam eas interpretes alio detorquent. His bene cognitis facile erit respondere ad controversias de regnorum jure, quæ ob differentes jurisconsultorum sententias difficillimæ putantur.

XXV. Primum quæritur an filius a patre exheredari possit, ut ne in regnum succedat. In quo distinguenda sunt regna alienabilia, id est, patrimonialia, a non alienabilibus. Nam in alienabilibus dubium non est, quin exhereditatio procedat, cum a bonis aliis nihil differant: atque ideo quæ

<sup>r</sup> *Apud Afros Maroci et Fessæ reges* Livius de *Masinissa*: Militante eo pro *Carthaginensibus* in *Hispania*, pater ejus moritur: (*Galba nomen erat*): regnum ad fratrem regis *Defalcen* (mos ita apud *Numidas* est) pervenit. [Idem locus est, qui in contextu indicatur, Lib. xxix. c. 29.] De *Mauritania* omnium vide *Marianam* libro xxix. (cap. 22.) Hinc sumto exemplo etiam apud *Saracenos*, qui ex *Africa* in *Hispaniam* venerant, fratres prælati filiis ad tempora *Abderamenis*; *Rodericus Toletanus Historiæ Arabum* c. 6. *Thuanus Historiarum* libro lxxv. in anno cIo Io lxxviii.

de *Hamete*: Quippe patris testamento ad regnum ordine post fratres vocatus, exclusi illorum filii. Idem succedendi genus valuisse et in *Mexicano*, et in *Peruano* regno ex historiis illorum locorum observo.

\* *Licita erit exhereditatio*] De tali regno intelligendum quod ait *Baldus* in præmio decretalium *Gregorii*, a rege successorem posse eligi e liberis quem velit. Exemplum est etiam in *Mexicana* historia.

\* In omnibus *Edd.* quæ vivo *Auctore* prodierunt, heic legitur: *primi natus*. Et videtur ita voluisse in casu secundo

rule, the brothers of the last possessor were preferred. So in Arabia Felix, the Tauric Chersonese, and the Africans of Morocco and Fez. And this rule is, in doubtful cases, followed in choosing trustees for family property, as is the sounder opinion, agreeing also with the Roman laws, though the commentators wrest them another way.

These rules being well known, it will be easy to answer the controversies concerning the right of succession, which are thought very difficult in consequence of the different opinions of jurists.

XXV. It is made a question, whether a son can be disinherited by his father so as to be prevented from succeeding to the kingdom. Here we must distinguish alienable, that is, patrimonial kingdoms, from those which are inalienable. In alienable cases, there is no doubt that disinheritance takes its effect, since the kingdom cannot differ from other property; and therefore the rules which by law or custom obtain as to *exhereditation* will have place here. And if there are no

Lib. xvi. p. 783.

L. Cum ita Legat. 32.  
§ in Fidei Commis. 6.  
D. de Leg. 2. Covar. Pract. quest. c. 38.  
Molin. d. l. c. 6. n. 47.

legibus aut moribus obtinent de exheredatione, hic quoque habebunt locum: et si nullæ proferantur leges aut mores, tamen naturaliter <sup>a</sup>licita erit exhereditatio usque ad alimenta; aut etiam sine ea exceptione, si crimen morte dignum filius admisit, aut alioqui graviter peccaverit, et sit unde ali possit. Sic Ruben a Jacobo ob culpam privatus est jure <sup>\*</sup>primi nati, Adonia regno <sup>a</sup> Davide. Imo etiam pro tacite exhereditato habebitur, qui grave crimen commiserit in patrem, <sup>b</sup>si nulla sunt condonatæ culpæ indicia. Sed in non alienabilibus, quanquam hereditariis, idem non procedet, quia populus viam quidem elegit hereditariam, <sup>c</sup>sed hereditariam ab intestato. Multo minus procedet exhereditatio in lineali successione, ubi nulla imitatione hereditatis ex dono populi regnum pervenit ad singulos, præscripto ordine.

### XXVI. Similis est quæstio, an abdicari possit regnum,

uti substantivo *natus*, obsoleto extracatum sextum. *J. B.*

<sup>a</sup> *A Davide*] Erat enim regnum illud velut patrimoniale Davidi, non quidem belli jure, sed Dei ipsius dono. [At non ob culpam exclusus est regno Adonia. Antequam enim regiam dignitatem adfectasset, jam David pollicitus erat Bathsebæ, matri Solomonis, se hunc successorem suum declaraturum, fidemque datam jurejurando firmarat, 1 Reg. i. 17. quod Deus etiam sibi placere significaverat, 2 Paralip. xxii. 9, 10, 11. Deinde Reges Hebræorum in designando Successore suo liberrime egisse,

et nullam fere ordinis nascendi rationem habuisse, ex tota Historia Sacra adparet. *J. B.*]

<sup>b</sup> Durum hoc est nimis: et merito ab Interpretibus Auctor noster heic reprehenditur. In dubio potius adfectus paternus mitiorem partem sequi jubet. Legum ex Jure Civili in ora libri indicatarum species plane diversæ sunt, ut in Notis Gallicis fuse ostendimus. *J. B.*

<sup>c</sup> *Sed hereditariam ab intestato*] Non testamento: non adoptione. Vide de Neapolitano regno Marianam libro **xx.**

L. 88. § 11.  
D. de Leg. 2.  
i. Fido 3.  
§ Scto. 11. D.  
de Adim. Leg.  
Hortem. et  
alii in c. Lic.  
de Voc.

laws or customs, by Natural Law exheredation is lawful, except as to aliment; and even without that exception, if the son have committed a crime worthy of death, or otherwise greatly offended. Thus Reuben was deprived of his right as first-born by Jacob for his offense, and Adonijah, of the kingdom, by David. And he is held for tacitly disinherited who has committed a grave crime against his father, if there are no tokens of *condonation* or pardon\*.

But in inalienable kingdoms, though hereditary, the same does not hold: because the people chose indeed the hereditary way; but the hereditary way with the usual succession to intestates.

Still less will exheredation hold good in a lineal succession, when the kingdom comes to each person by the gift of the people, without attempting to imitate the hereditary rule.

### XXVI. Similar is the question whether the kingdom, or the right

\* This is rejected by Barbeyrac as too severe.

aut jus succedendi in regnum. Et quin pro se quisque abdicare possit non est dubium: an et pro liberis, magis controversum, sed quod eadem distinctione expediri debet. Nam in hereditariis qui jus a se abdicat, in liberos nihil potest transferre: at in lineali successione patris factum nocere non potest liberis natis, quia simul atque existere coeperunt jus proprium eis quæsitum est ex lege: sed nec nascituris, quia impedire non potest quin ad illos quoque suo tempore jus pertineat ex populi dono. Neque obstat de transmissione quod diximus: est enim ea transmissio necessaria, non voluntaria, ad parentes quod attinet. Illud interest inter natos et nascituros quod nascituris nondum quæsitum sit jus, atque ideo auferri iis possit populi voluntate, si etiam parentes, quorum interest jus ad filios transire, jus illud remiserint: quo pertinent ea quæ de derelictione supra diximus.

XXVII. 1 Solet et hoc quæri, an de successione regni judicare possit, aut rex qui nunc regnat, aut populus per se, aut per iudices datos. <sup>6</sup>Negandum utrumque est de iudicio

<sup>6</sup> Populi est omnino iudicium, qui hoc casu, salvo jure successionis, interim quasi sui juris sit, quantum necesse est ad litem dirimendam. Qua de re plenius egimus in nostris ad hunc locum

Notis Gallicis. Gronovius tamen in Nota sua diffusa, quod alibi haud semel fecisse vidimus, heic etiam mire cavillatur. *J. B.*

<sup>7</sup> *Causa successionis non subjecta*

of succeeding to it, can be abdicated. And that each person for himself may abdicate, there is no doubt: whether he can do so for his children also, is more controverted, but is to be solved by the same distinction. For in hereditary kingdoms, he who abdicates for himself can transfer nothing to his children. But in a lineal succession, the act of the father cannot be allowed to prejudice sons already born; because as soon as they began to exist, they acquired a right by law; nor sons not yet born, because it cannot prevent that the right should descend to them also by the gift of the people. Nor does the difficulty of transmitting the right make any obstacle: for the transmission is necessary, not voluntary, so far as the parents are concerned. There is this difference between children born, and to be born; that those not yet born have not yet acquired any right, and therefore their rights may be cut off by the will of the people, if the parents whose interest it is that the right should pass to the sons have given up that right: and to this pertains what we have said above of dereliction.

XXVII. 1 This also is made a question, Whether the reigning king, or the people, or judges appointed by them, can judge concerning the succession. And we must deny that they can pronounce a judg-

jurisdictionis. Nam jurisdictionis non est nisi apud superiorem, non nuda ratione habita personæ, sed causæ simul, quæ spectanda est cum suis circumstantiis. Est autem <sup>x</sup>causa successionis non subjecta regi nunc regnanti: quod inde apparet, quod rex nunc regnans nulla lege obligare potest successorem. Successio enim imperii non est sub jure imperii, ac proinde mansit in statu naturali, quo nulla erat jurisdictionis.

2 Attamen si controversi juris sit successio, recte et pie facient qui jus vindicant, si de arbitris inter se conveniant; quod alibi tractabitur. Populus vero omnem a se jurisdictionem in regem et regiam familiam transtulit, nec ea durante ulla ejus habet reliquias. De vero regno loquor, non de principatu. Attamen si de primæva populi voluntate quæstio incidat, <sup>y</sup>non abs re erit populum qui nunc est, quique idem cum eo qui olim fuit censetur, suum super ea re sensum exprimere, qui sequendus erit, nisi satis certo constet olim aliam fuisse populi voluntatem, et ex ea jus quæsitum.

*regi*] De Galliarum regno vide Thuanum libro cv. anno cIo Io xciii. vide et Guicciardinum.

<sup>y</sup> Non abs re erit populum] Sive in conventu Ordinum, ut factum in Anglia

et Scotia, teste Camdeno in annis cIo Io lxxi. et lxxii. sive per delegatos ad id negotium, ut factum in Arragonia teste Mariana libro xx.

ment as if they had jurisdiction in such a case. For jurisdiction belongs only to a superior, not merely taking account of the person, but of the cause also, which is to be regarded with its circumstances. But the cause of the succession is not subject to the reigning king: which appears from this, that the reigning king cannot bind his successor. For the succession to the sovereignty is not under the authority of the sovereign, and therefore remains in the natural state in which there was no jurisdiction\*.

2 If however the right of succession be controverted, they who claim the right, will do rightly and piously if they agree to appoint arbitrators. The people has transferred all the jurisdiction from itself to the king and the royal family; and so long as that lasts, it has no relics of it. I speak of a true kingdom, not merely of a government. But if a question arise concerning the primeval will of the people, it will be much to the purpose to ask the people now existing, which is conceived to be the same with the former people, to express its opinion upon that matter, which is to be followed, except it appear certainly

\* Gronovius argues against this doctrine, but rather in the manner of a rhetorician than a jurist. W.



Paus. iv. 10.

Sic Euphaes Rex Messeniis permisit <sup>7</sup> dispicere quem ex regali Ægyptidarum genere regnare oporteret: et de Xerxis et Artabazanis controversia populus cognovit.

Just. ii. 9.  
Plut. de  
Amor. Frat.  
p. 486.  
Hottom. III.  
q. 2. Tir. de  
Primog. q. 31.

XXVIII. Ut ad alia veniamus, filium qui ante regni adeptionem natus est, in regno individuo præferendum ei qui in regia fortuna natus est, in quavis successione specie verum est. Nam in regno dividuo haud dubie partem feret, ut in bonis ceteris, in quibus nunquam distinguitur quo tempore sint quæsitæ. Qui autem partem ferret in dividuo, et in individuo ætatis privilegio præfertur: quare et feudum sequitur filium, qui ante primam vestituram natus est. Sed et in lineali successione simul atque regnum quæsitum est, spes aliqua parta est liberis ante natis: nam fac alios postea natos non esse, nemo prius natos excludendos dixerit. In hoc autem genere successione spes semel parta jus facit, nec ex

<sup>7</sup> Ita quidem Interpres Pausaniæ: *Regnum populi arbitrio permisit: sed aliud Græca significant: Εὐφασὶ δὲ οὐκ ὄντων παιδίων, τὸν αἰρεθέντα ὑπὸ τοῦ δήμου κατελείπετο ἔχειν τὴν ἀρχήν. Quum Euphaës nullus haberet liberos, relinquebatur ut ille succederet in imperium, qui a Populo electus futurus esset, id est, eo res omnino deveniebat. Ut proinde innuat Pausanias, Populum usum esse suo jure, neque ex concessionem Regis tunc regnantis arbitrium illud nactum esse. Ceterum, ut*

heic κατελείπετο, ita λείπετο sumitur apud Polybium, Lib. vi. cap. 64. Eodem sensu est apud Epictetum, *Enchirid.* cap. 73. ἀπολείπεται (cap. 46. *Edit. Meibom.*) J. B.

\* *Et Arsicam*] Cui nomen factum Artaxerxi Mnemoni. Vide Plutarchum *Artaxerze*.

\* *Inter Ottonem primum et Henricum*] Vide hac de re Sigebertum, et notata ad librum III. Wittikindi. Bajazetes, et Gemes, inter se de Turcico regno certarunt; major natu Bajazetes

that the will of the people formerly was different, and that a right was thence acquired. Thus Euphaes, as king, permitted the Messenians to determine who of the royal family of the Egyptidæ should reign; and in the controversy of Xerxes and Artabazanes the people decided.

XXVIII. To come to other questions; that a son who was born before his father's accession to the kingdom is, in an indivisible kingdom, to be preferred to one born during the enjoyment of power, is true in every form of succession. In a divisible kingdom he will doubtless have his share; as is the case with other property, in which no difference is ever made as to the time when it was acquired. Now he who would take a share in a divisible inheritance, will, in a matter indivisible, be preferred on the ground of age; and thus the fief follows the son who was born before investiture. But in a case of lineal succession also, as soon as the kingdom is acquired, there is some expectancy given to the children born previously; for suppose that none were born afterwards, nobody will say that the former children were to be

post facto cessat, nisi quod ex sexus privilegio suspenditur in cognatica successione. Obtinuit hæc quam diximus sententia in Perside inter Cyrum <sup>a</sup>et Arsicam, in Judæa inter Antipatrum Herodis magni filium et ejus fratres; in Hun-

Joseph. Ant.  
Jud. xvi. 3.  
3. et c. 4.  
6.

garia cum Geissa regnum adiit; et in Germania, non sine armis tamen, <sup>a</sup>inter Ottonem primum et Henricum.

XXIX. Quod autem Spartæ aliter factum legimus, ex lege propria est ejus populi, quæ ob educationem magis accuratam natos in regno præferebat. Idem accidere poterit ex peculiari lege vestituræ primævæ, si imperium detur in feudum vasallo et ex eo nascituris: quo argumento nixus videtur fuisse Ludovicus adversus Galeatium fratrem in controversia ducatus Mediolanensis. Nam <sup>b</sup>in Perside Xerxes, qui contra fratrem Artabazanem obtinuit regnum, ut Herodotus notat, Lib. vii. 3. potentia Atossæ matris magis quam jure valuit. Atque in

at Gemes natus imperanti, prævaluit Bajazetes. Mariana libro xxiv. (cap. xxi.) Constantinus Ducas imperium reliqui filii, quorum duo privato erant geniti, tertius *πορφυρογέννητος*. Zonaras. (Lib. xviii. cap. 9. *Ed. Reg.*) Vide Corsetum tract. de *Prole Regali* III. parte, questione 26.

<sup>b</sup> In *Perside Xerxes*] Imo et Xerxi socius regni factus Artaxerxes, non autem Darius et Hystaspes, majores, sed ante adeptum imperium geniti. [Vide *ΠΕΤΑΥΙΟΥ, Doctrin. Tempor.* Lib. x.

c. 25. et *Rationar.* Part. II. Lib. III. c. 10.] At forte verum est regnum Persidis pependisse a populi suffragiis, sed intra gentem regiam conclusis. Nam id de Arsacidis, qui Parthi Persis imperavere, tradidit Ammianus libro xxiii. (c. 6. p. 397. *Ed. Vales. Gron.*) et de Persis, qui iisdem Parthis successere, Zonaras in Justino. [Lib. xiv. cap. 5. ubi id tantum dicit, Cavadem, Persarum Regem, Chosroës filio suo natu minimo destinasse imperium, exclusis filiis natu majoribus.]

excluded. But in this kind of succession, an expectancy once given to any one gives him a right, and does not cease by any subsequent event; except that in a cognatic succession it is suspended by the privilege of sex. The opinion which we are stating obtained in Persia between Cyrus and Arsica; in Judea between Antipater, the son of Herod the Great, and his brothers; in Hungary, when Geissa took the kingdom; and in Germany, though not without recourse to war, between Otho I. and Henry.

XXIX. The fact that a different rule was followed at Sparta, proceeded from a peculiar law of that people, which on account of their education, preferred those that were born in the reign. The same may take place by a peculiar Law of the primitive investiture, if the government be given as a fief to a vassal and his offspring: on which argument Ludovico seems to have relied against Galeazzo his brother, in the controversy respecting the dukedom of Milan. For in Persia, Xerxes who obtained the kingdom against his brother Artabazanes owed his success

eadem Perside cum eadem postea controversia nata esset, ut jam attigimus, inter Artaxerxem Mnemona et Cyrum, Darii et Parisatidis filios, Artaxerxes ut natu major, quanquam in privata fortuna genitus, rex dictus est.

XXX. 1 Non minus agitatum etiam bellis et pugnis singularibus, <sup>c</sup>an nepos ex filio priore filio posteriori sit præferendus. Sed hoc in lineali successione difficultatem nullam habet: ibi enim mortui pro vivis habentur in hoc, ut jus in liberos transmittant: quare in tali successione sine ullo ætatis respectu præferetur filius, imo in cognaticis regnis et filia, primo nati: quia nec ætas nec sexus efficiunt, ut deseratur linea. At an hereditariis dividuis concurrent ad partes, nisi in istis regionibus, ubi subitio in locum non observatur, <sup>d</sup>ut olim in Germania apud populos plerosque: sero enim nepotes admissi sunt cum filiis ad hereditatem. At in dubio credendum potius est locum esse vicariæ isti successioni, quia natura ei favet, ut supra diximus.

2 Quod si aperte jure civili regionis introducta sit subitio in locum mortui parentis, locum habeat etiam si in aliqua

<sup>c</sup> *An nepos ex filio priore, filio posteriori sit præferendus*] Vide Choppinum *de Domino* Lib. II. Thomam Grammaticum *decisione Neapolitana* 1.

Johannem le Cirier *de Primogenitura*, qui liber insertus est in *Oceanum juris Marianam* libro XX. (cap. 3) et libro XXVI. Cromerum libro XXX.

to the power of his mother Atossa, rather than to his right, as Herodotus notes. And in the same kingdom of Persia, when afterwards the same controversy arose between Artaxerxes Mnemon and Cyrus, Artaxerxes as the eldest, though born in a private station, was made king.

XXX. 1 It has also been a matter of contest, discussed by means of wars and single combats, whether the grandson of the former son be to take precedence of the later son. This, in a lineal succession, can have no difficulty; for there the dead are held as living, in this respect, that they transmit their right to their children: wherefore in such a succession the son of the first-born is preferred without any regard to age; and in cognatic kingdoms, the daughter also: for neither age nor sex lead them to desert the line. In divisible hereditary kingdoms, the claimants share the inheritance according to the shares of the sons; except in those countries in which the substitution of the son for the parent is observed, as among most peoples in Germany. For it was only at a later period that grandsons were admitted along with sons to the inheritance. But in a doubtful case, we are rather to suppose that that vicarious succession has place, because nature favours it.

2 If the substitution of the son in the place of his deceased

Hott. 77. q. 3.  
Tiraq. de  
Prim. q. 40.  
Molin. de  
Prim. lib. 6.

Wittsch. Sax.  
Hist. II. p. 18.  
Molin. de  
Prim. lib. 6.

lege proximi fiat mentio. Rationes quæ ex legibus Romanis adferuntur ad hanc rem minus firmæ sunt; quod apparebit leges ipsas inspicienti. Sed hæc ratio optima est, quod in materia favorabili dictionum significatio extendenda est ad omnem proprietatem, non vulgarem tantum, sed et artificialem, ita ut sub nomine filiorum comprehendantur adoptivi, et sub nomine mortis mors civilis, quia leges ita loqui consueverunt. Quare merito proximi nomine veniet is quem lex in proximum gradum perducit. In regnis vero hereditariis individuis, ubi subitio in locum exclusa non est, neque semper nepos, neque semper filius secundo genitus præferuntur, sed ut inter pares, quippe juris effectum quoad gradus adæquatos, potior erit is qui ætate præcedit: nam in ætatis privilegium non succedi in regnis hereditariis supra diximus. Apud Corinthios succedebat ὁ πρεσβύτατος ἀεὶ τῶν ἐκγόνων, ex liberis defuncti regis is qui natu esset maximus, ut ex Diodori Siculi libro sexto exscripsit Georgius Monachus. Sic et apud Vandalos, cauto ut hæres esset qui sanguine proximus et

Procop. Bell.  
Vand. l. 7, 8.

<sup>d</sup> Ut olim in Germania] Vide quæ supra notavimus ad § xi. Ea de causa olim in Palatinatu prælatus Rupertus minor Ruperto alteri venienti ex pri-

mogenito. Vide apud Reinkingium Lib. i. classe iv. c. xvii. n. 35.

<sup>e</sup> Prælatus filius secundus natu major filii primi filio] Honoricus Genzo-

parent be plainly introduced by the Civil Law, it will have place, although, in any law, *proximus*, "the nearest relation," be mentioned as the successor. The reasons which are drawn from the Roman Laws to this effect, are insecure; as will appear to any one who examines these laws themselves. But this is the best reason; that in a favourable matter, the signification of words is to be extended to every property, not common only, but artificial also; so that under the name of sons are to be comprehended adoptive sons; and under the name of death, civil death, because the laws have been accustomed so to speak. Therefore he may justly come in the name of *proximus* whom the law has put in the nearest place to the succession. But in hereditary indivisible kingdoms, in which substitution of one person into the place of another is not excluded, we cannot say that either the grandson always, or the second son always, is preferred; but as being equal in claim, by the effect of law in equalizing their degrees of relationship, he is preferable who is the elder; for in hereditary kingdoms, as we have said, the privilege of age is not transferred by succession. At Corinth the eldest of the descendants of the deceased king succeeded. So among the Vandals it was provided that the heir should

Comr. Vicer.  
Fil. Hen.  
VII.

primi filio. Sic in Sicilia Robertus prælatuſ est Martelli fratris majoris filio, non ea proprie ratione quam excogitavit Bartolus, quod feudum eſſet Sicilia, ſed quod regnum eſſet hereditarium.

Aymo. III. 62.

3 Exſtat ſimilis ſucceſſionis vetuſ in Francorum regno exemplum in Guntrano, ſed id ex electione potiuſ populi contigit, quæ eo tempore nondum plane deſierat. At poſtquam ſine ulla electione linealiſ agnatica ſucceſſio introducta eſt, reſ caret controverſia, ut olim apud Spartanos, ubi ad Heraclidæ regno delato ſimilis exſtitit ſucceſſio linealiſ agnatica. Ideo Arcuſ ex fratre majore Cleonymo natuſ patruo ſuo Cleonymo antepoſituſ eſt. Sed et in cognatica linealiſ ſucceſſione præferetur nepoſ: ut in Anglia 'Joanneſ Edvardi nepoſ ex primogenito, ejuſdem Edvardi filiis Hemoni et Thomæ: quod et in Caſtellæ regno lege cautum eſt.

Plut. Lycury.  
p. 40.  
Juſt. III. 2.  
Pauſ. III. 6.

XXXI. Pari diſtinctione reſpondendum eſt ad quæſti-

niſ filiuſ Gundemundo. De tali ſucceſſione vide quæ ſupra in textu et Notis § xxiv. [Honoricuſ, ſive Hounericuſ, non autem Henricuſ, (ut hactenuſ fuerat in omnibuſ Edd. mendo Typographico) frater erat junior Genzonis præmortui, non filiuſ: Gundemunduſ vero, filiuſ Genzonis. Dicendum igitur erat, Honoricuſ, filiuſ Gizerici natuſ minorem, prælatuſ fuiſſe Gundemundo, fra-

triſ natuſ majoriſ Genzonis filio: ſicque exemplum veritati hiſtoriæ, ſimul et argumento, congruit. Vide locum Procopii, adcuratiuſ laudatuſ, quam a Grotio fuerat, et a BODINO, *De Rep. Lib. VI. c. v. pag. 1145.* unde errorem haſiſſe videtur noſter. *J. B.*]

'*Johanneſ Edvardi nepoſ*] Vide Seranum (pag. 196). Carolo Sapiente: et Marianam libro xviii. qui ab Edvardi

be he who waſ neareſt and oldeſt; and the ſecond ſon, being older, waſ preferred to the ſon of the firſt ſon. So in Sicily, Robert waſ preferred to the ſon of hiſ elder brother Charles Martel, not exactly for the reaſon which Bartolus deviſed, becauſe Sicily waſ a fief; but becauſe the kingdom waſ hereditary.

3 We have a ſimilar ſucceſſion exemplified in the Frank kingdom, in Guntram; but that happened rather by the election of the people, which at that time had not quite fallen into diſuſe. But ſince the agnatic lineal ſucceſſion without any election iſ introduced, the matter iſ clear of controverſy: aſ formerly at Sparta, where, when the kingdom paſſed to the Heraclidæ, there waſ a ſimilar agnatic lineal ſucceſſion. And thuſ Arcuſ waſ preferred to hiſ uncle Cleonymuſ. But in the cognatic lineal ſucceſſion alſo the grandſon iſ preferred; aſ in England, Richard\* the grandſon of Edward III. by hiſ firſt-born [the Black Prince] waſ preferred to Edmund and Thomas [and others], ſonſ of the ſame Edward III.: which alſo iſ the rule in the kingdom of Caſtile.

XXXI. By a like diſtinction we reply to the queſtion between

\* Barbeyrac haſ corrected Grotiuſ'ſ miſtakeſ in the Engliſh royal genealogy.

nem inter fratrem superstitem ultimi regis, et fratris majoris filium : nisi quod sciendum est multis in locis inter liberos successionem in gradum mortui esse receptam, ubi recepta non sit in limite transverso. Sed ubi jus non est manifestum, <sup>§</sup>in partem eam quæ liberos parentibus surrogat, potius inclinandum est, quia eo nos ducit æquitas naturalis, in bonis nempe avitis. Nec obstat quod hoc jus in fratrum filiis *πρόνομιον* vocat Justinianus : id enim facit non ratione habita æquitatis naturalis, sed juris antiqui Romanorum. Percurramus alias quæstiones quas profert Emanuel Costa.

Nov. 112. c. 2.

XXXII. Defuncti fratris filium, aut etiam filiam patruo regis præferri ait; recte, non in lineali tantum successione, sed et in hereditaria, in regnis ubi subitio in locum mortui observatur : non item in regnis quæ verbis præcisus gradum naturalem spectant : is his enim vincet qui sexu aut ætate erit potior.

L. Tutel. 2.  
 § Sed si alitq.  
 h. D. de Leg  
 Tutel. 2.

filiis ne controversiam quidem motam ait. (c. 1.) Idem Mariana cum libro XIV. (cap. 8) egisset de controversia inter Alfonsi filium et nepotem ex filio, a conventu ait pro Sanctio filio pronuntiatum, incertum jure an injuria. [Joannem Auctor noster dixit, pro Richardo, ut vel ex Historicis heic laudatis manifestum est. Joannes unus fuit e patris Richardi; alter vocabatur Ed-

mundus, non Hemon. Vide POLYDOR. VIRGIL. *Hist. Angl.* Lib. xx. init. et CLARISS. CLERICI *Bibl. Select.* Tom. xxvi. pag. 1, et seqq. J. B.]

§ *In partem eam quæ liberos parentibus surrogat, potius inclinandum est*] Vide de Joanne et Arto Serranum in Philippo Augusto. Idem in Britannia Armorica pro lineali successione judicatum narrat in Philippo Valesio et Ca-

the surviving brother of the last king, and the son of his elder brother: except that we must know that in many places succession into the place of a person deceased is received, as among the children, when it is not received in the transverse line. When the law is not manifest, we are rather to incline to that rule which puts children in the place of their parents, because natural equity points that way, that is, in things which have descended from the grandfather. Nor is it any objection that Justinian calls the right existing in the sons of brothers a *privilege*; for that he does, not with reference to Natural Law, but to the old Roman Law.

Let us run over some other questions which Emanuel Costa proposes.

XXXII. He says, that the son of the brother of the deceased, or even his daughter, is to be preferred to their uncle; rightly, not only in a lineal succession, but also in a hereditary one, in kingdoms where substitution in the place of the deceased is observed: but not in kingdoms which in precise words respect the natural degree; for there he will be preferred who is superior in sex or age.

XXXIII. Addit, nepotem ex filio filiæ præferri: recte, ob sexum scilicet: cum hac exceptione, nisi quæstio sit in ea regione, quæ etiam inter liberos gradum solum spectet.

XXXIV. Adjicit, minorem nepotem ex filio præferri nepoti majori ex filia; <sup>b</sup>quod in lineali cognatica successione verum est, in hereditaria non item, nisi lex specialis ostendatur. Nec ratio allegata sufficit, quia pater hujus illius matrem fuerat exclusurus: id enim evenisset ob præstantiam mere personalem quæ non transit.

XXXV. Quod addit verisimilius sibi videri, ut neptis ex filio primogenito filium excludat, in regnis hereditariis recipi non potest, etiam admissa in vicem mortui substitutione: ea enim efficit, ut capax sit successione: sed inter capaces valere debet sexus privilegium.

XXXVI. Atque ideo <sup>1</sup>in Arragoniæ regno filius sororis filiæ fratris prælatus est.

Illesc. Lib. iv.  
Hist. Font.  
cap. 19.  
Affict. e. 1.  
col. 5. n. 20.  
de Nat. Succ.  
Aguir. Apol.  
n. 82.

rolo VIII. (Pag. 165 et 422. De prioribus autem p. 118).

<sup>b</sup> Quod in lineali successione verum est] Idque in Lusitania probat Mariana libro xxvi. Tamen contra id Emanulem ait Imperatori Maximiliano prælatum, gentis studiis. (Cap. xi.) Sic idem libro xii. quod in Castellæ regno

Ferdinandus filius Berengariæ sororis minoris defuncti regis Henrici prælatus est Blanca, sorori majori ejusdem regis, Galliæ odio factum ait, in quam Blanca inuuperat. (Cap. 7.)

<sup>1</sup> In Arragoniæ regno] Olim ibi creditum ait Mariana, fratrem regis, non filias, debere succedere. Postea vero

XXXIII. He adds, that a grandson through a son is preferred to a daughter; rightly; namely, on account of sex: with this exception, unless the question be in a country which, even among children, regards only the degree [the order, not the sex].

XXXIV. He adds, that a younger grandson by a son, is preferred to an older grandson by a daughter; which is true in a cognatic lineal succession, but not in a hereditary, except a special law be produced. Nor is the alleged reason sufficient, that the father of the first would have excluded the mother of the second; for that would have happened on account of a mere personal preference, which is not transferred.

XXXV. What he adds as probable in his opinion, that the granddaughter by the first-born excludes a younger son, cannot be received in hereditary kingdoms, even if we admit substitution in the place of the deceased: for that does indeed make the granddaughter capable of the succession; but among those capable, the privilege of sex must have its weight.

XXXVI. And therefore in the kingdom of Arragon, the son of a sister is preferred to the daughter of a brother.

XXXVII. Eundemque ad modum in regnis hereditariis postponenda erit filia fratris maximi natu, fratri regis natu minori.

linealem successionem ita placuisse, ut sororis filius iis, qui ex fratre, sed remotiore gradu, veniebant, præferretur: libris xv. 13; xix. 21; xx. 2; et 8. Idem libro xxiv. de Alfonso agens (cap. 18): *Ad Arragonii regni heredi-*

*tatem nepotes Ferdinandi filii: ex filia etiam si mascula proles deesset, filiabus ejusdem præferendos sanxit; additque: Sic sæpe ad regum arbitrium jura regnandi commutantur. Vide eundem Marianam libro xxvii. 3.*

---

XXXVII. In the same manner, in hereditary kingdoms, the younger brother of the king is preferred to the daughter of his elder brother.

---



## CAPUT VIII.

### DE ACQUISITIONIBUS, QUÆ VULGO DICUNTUR JURIS GENTIUM.

- |   |   |
|---|---|
| <p>I. <i>Multa dici juris gentium, quæ, si proprie loquamur, talia non sint.</i></p> <p>II. <i>Pisces et feras stagnis aut vivariis inclusas in dominio esse jure naturali, contra quam jure Romano proditum est.</i></p> <p>III. <i>Feras si aufugerint non desinere eorum esse, qui ceperant, si recte agnosci possint.</i></p> <p>IV. <i>Possessio an per instrumenta acquiratur, et quomodo.</i></p> <p>V. <i>Ut feres regum sint, non esse contra jus gentium.</i></p> <p>VI. <i>Rerum aliarum hero carentium quomodo acquiratur possessio.</i></p> <p>VII. <i>Thesaurus cui cedat naturaliter: et legum circa hoc varietas.</i></p> <p>VIII. <i>Quæ jure Romano de insulis et alluvionibus sunt prodita, nec naturalia esse, nec juris gentium.</i></p> <p>IX. <i>Naturaliter insulam in flumine et alveum exsiccatum ejus esse, cujus est flumen aut pars fluminis, id est, populi.</i></p> <p>X. <i>Inundatione naturaliter dominium agri non amitti.</i></p> <p>XI. <i>Alluviones quoque in dubio esse populi.</i></p> <p>XII. <i>Sed concessas videri his, quorum agri alium finem quam</i></p> | <p><i>flumen non habent:</i></p> <p>XIII. <i>Idem censendum de relicta ripa et siccata alvei parte.</i></p> <p>XIV. <i>Quid pro alluvione, quid pro insula habendum.</i></p> <p>XV. <i>Quando vasallis cedant alluviones.</i></p> <p>XVI. <i>Solvuntur argumenta quibus Romani jus suum quasi naturale defendunt.</i></p> <p>XVII. <i>Via naturaliter alluvionem impedit.</i></p> <p>XVIII. <i>Naturale non esse ut partus solum ventrem sequatur.</i></p> <p>XIX. <i>Naturaliter ut confusione, ita specificatione ex materia aliena rem fieri communem:</i></p> <p>XX. <i>Etiam si materia mala fide attractata sit.</i></p> <p>XXI. <i>Naturale non esse ut pro prevalentiam res minor portiori cedat: ubi et alii Romanorum jurisprudentium errores notantur.</i></p> <p>XXII. <i>Naturaliter ex plantatione, insitione, cædificatione in alieno communionem nasci.</i></p> <p>XXIII. <i>Possessorem naturaliter fructus suos non facere; impendia imputare posse:</i></p> <p>XXIV. <i>Etiam qui mala fide possidet.</i></p> <p>XXV. <i>Traditionem ad dominii translationem naturaliter non requiri.</i></p> <p>XXVI. <i>Usus hactenus dictorum.</i></p> |
|---|---|
- I. 1 **P**ERDUXIT nos ordo ad acquisitionem quæ fit jure gentium, distincto a jure naturali, quod jus gentium

CHAPTER VIII. *Of acquisitions commonly said to be jure gentium.*

I. 1 The order of our subject has led us to that acquisition which takes place *jure gentium*, as distinct from *jus naturale*, Natural

voluntarium supra diximus. Talis est ea quæ fit belli jure : sed de hac re rectius infra agemus, ubi belli effectus explicabuntur. Romani jurisconsulti ubi de acquirendo rerum dominio agunt, <sup>1</sup> complures ejus acquirendi recensent modos, quos juris gentium vocant : sed si quis recte advertat, inveniet eos omnes, excepto belli jure, non pertinere ad jus gentium illud de quo agimus : sed aut referendos ad jus naturæ, non quidem merum, sed quod sequatur introductum jam dominium, et legem omnem civilem antecedit, <sup>2</sup> aut ad ipsam legem civilem, non solius populi Romani, sed multarum circa nationum : credo quia talis legis sive moris origo a Græcis venerat, quorum instituta, ut Halicarnassensis et alii notant, Italiæ ac vicini populi sequebantur.

2 Hoc autem non est jus illud gentium proprie dictum ; neque enim pertinet ad mutuum gentium inter se societatem,

<sup>1</sup> Jurisconsulti Romani, ubi de modis illis acquirendi domini agunt, non eodem sensu *Jus Gentium* intelligunt, ac Auctor noster ; sed de ipso *Jure Naturali* agunt, quod recentiores Interpretes *Secundarium* vocant. Res clara est ex toto Titulo et *Institutionum*, et *Digestorum* ; ubi etiam interdum illud vocant diserte *Jus Naturale*. Igitur in eo tantum recte reprehendit Auctor noster priscos Jurisconsultos, quod illi nonnulla, quasi Juris Naturalis, tradant, quæ veris Juris Naturalis principiis

minime consentanea sunt. *J. B.*

<sup>2</sup> *Aut ad ipsam legem civilem, non solius populi Romani, sed multarum circa nationum*] Qualis consensus gentium incertis ex causis, etiam in aliis moribus ad jus nihil facientibus, notatur a Plinio, ut hominem non cremari priusquam genito dente VII. 16 : ut Ionum literis uterentur, VII. 57 : uti tonsoribus, VII. 59 : in horarum observatione, VII. 60 : genibus tribuere quandam religionem, XI. 45 : fulgetra poppymis adorare, XXVIII. 2.

Law ; which we have above called Instituted *Jus Gentium*. Such are the things done by the Laws of War ; but we shall treat of these hereafter.

The Roman Jurists, when they speak of acquiring the ownership of things, reckon many ways of such acquisition, which they say are *juris gentium* ; but if we duly attend, we shall see that they all, if we except the Laws of War, do not pertain to that *jus gentium* of which we now speak ; but are either to be referred to Natural Law (not mere Natural Law, but that which follows the introduction of ownership, and precedes all Civil Law,) or to the Civil Law, not of the Roman People alone, but of many other nations : I suppose, because the origin of such Law or custom came from the Greeks, whose Institutions, as Dionysius Halicarnassensis and others note, the peoples of Italy and the neighbourhood followed.

2 But this is not the *jus gentium* properly : for that does not pertain to the mutual society of nations amongst themselves, but to the

sed ad cujusque populi tranquillitatem: unde et ab uno populo aliis inconsultis mutari potuit, imo et hoc evenire ut aliis locis atque temporibus longe alius mos communis, ac proinde jus gentium improprie dictum introduceretur: quod et revera factum videmus, ex quo Germanicæ nationes Europam ferme omnem invaserunt. Sicut enim olim jura Græca, ita tunc Germanica instituta passim recepta sunt, et nunc etiam vigent. Primus acquirendi modus qui juris gentium a Romanis dicitur, est occupatio eorum quæ nullius sunt: qui modus haud dubie est naturalis, eo quo dixi sensu, introducto jam dominio, et quamdiu aliud lex nulla constituit. Nam et dominium a lege civili effici potest.

II. Ad hoc caput refertur primum captura ferarum, avium, piscium. Sed hæc omnia quamdiu nullius dicenda sint, quæstione non caret. Nerva filius pisces qui in piscina sunt possideri a nobis ait, non qui in stagno: et feras quæ in vivario sunt inclusæ, non quæ in silvis <sup>2</sup>circumseptis vagantur. Atqui pisces non minus stagno privato includuntur quam piscina, et feras non minus coercent silvæ bene circumseptæ

L. Possid. 3.  
 § Item Feras.  
 14. D. de  
 Acq. Poss.

<sup>2</sup> At vero in Lib. III. § 14 D. *De acquir. vel amitt. possess.* legendum, quæ in silvis non circumseptis vagantur: ut, post Franc. Hotomannum, probat. Clariss. NOODT, Obs. I. II. Ceterum de acquisitione et amissione dominii in

Feras vide quæ diximus ad PUFENDORFIUM nostrum, *De Jure Nat. et Gent.* Lib. IV. cap. VI. § 5. et seqq. in altera præsertim Editione. J. B.

<sup>b</sup> Quod ob difficillimam persecutionem eas pro derelictis habere credamur]

tranquillity of each people: whence it might be changed by one people without consulting others; and also it might happen that in various places and times, very different usages, and thus, different *jus gentium* improperly so termed, might be introduced: which, we see, happened, in fact, from the time that the Germanic nations invaded almost the whole of Europe. For as the laws of Greece formerly, so now Germanic Institutions are everywhere received, and are still in authority.

The first mode of acquiring ownership which is called by the Romans *juris gentium*, is the occupation of things which belong to no one (*res nullius*): which mode is, doubtless, natural in the sense which I have mentioned; ownership being supposed to be introduced, and as long as the law has made no other appointment. For ownership may also take place by the Civil Law.

II. To this head is referred, first, the capture of wild beasts, birds, fishes. But how long these are *res nullius*, belong to no one, is not without question. Nerva says, that fishes in a pond are ours, fishes in a lake are not; beasts which are in a park are ours, not those which

quam vivaria, quæ Græci vocant *θηριοτροφεῖα* nec alio hæc differunt quam quod altera angustior, altera laxior custodia est. Quare nostro seculo rectius contraria opinio prævaluit, ut et feræ silvis privatis, et pisces stagnis inclusi, ut possideri, ita in dominio esse intelligantur.

III. Feras simul atque naturalem libertatem recipiunt, nostras esse desinere aiunt Romani Jurisconsulti: atqui in rebus omnibus aliis a possessione quod incipit dominium, non ideo amissa possessione amittitur; imo jus dat etiam ad repetendam possessionem. Res autem nostras alius a nobis auferat, an ipsæ sese, ut servus fugitivus, non multum refert. Quare verius est non per se amitti dominium, eo quod feræ custodiam evaserint, sed ex probabili conjectura, <sup>b</sup> quod ob difficillimam persecutionem eas pro derelictis habere credamur, præsertim cum internosci quæ nostræ fuerint ab aliis non possint. Sed hæc conjectura per alias conjecturas elidi potest; ut si addita sunt feræ <sup>c</sup> *γνωρίσματα*, sive <sup>d</sup> *crepundia*, qualia scimus habuisse cervos quosdam et accipitres, atque inde agnitos et dominis redditos. <sup>e</sup> Requiritur autem corpo-

L. Quodentim.  
3. § 1. D. de  
Acq. Rer.  
Dom.  
L. Pomp. 13.  
D. de Acq.  
Poss.

שרא Hebræis id dici notavimus supra ad caput iv. § 5.

<sup>c</sup> *γνωρίσματα*] Donatus ad *Eunuchum* iv. 6, monumenta sunt quæ Græci dicunt *γνωρίσματα*, seu *σπάργανα*. (Ad vers. 15.)

<sup>d</sup> *Crepundia*] Usurpat hoc sensu hanc vocem apologetico Apuleius. (Pag. 64. Ed. Pricæi.)

<sup>e</sup> *Requiritur autem corporalis quædam possessio*] Harmenopulus, Lib. ii. Tit. 1. *μη ἐτέρωσε γὰρ τὸν τρώσαντα*

range in the woods, though surrounded by a fence. But fishes are included in a lake, which is private property, as much as in a pond; and a well-fenced wood shuts in beasts, no less than a park: these things differ only in that one is a narrower, the other a wider custody. And accordingly, in our time, the contrary opinion more rightly prevails: and beasts in private woods, and fishes in private lakes, as they can be possessed, so can they be owned.

III. The Roman jurists say, that when beasts recover their natural liberty they cease to be ours: but in all other things the ownership which begins with possession is not lost when we lose the possession; but, on the contrary, gives a right to recover possession. And it cannot make much difference whether it be a fugitive slave that takes them away, or that they take themselves away. Therefore the sounder opinion is, that the ownership is not lost because the beasts escape from our custody, but that it is lost from the probable conjecture, that we may be supposed to let them go as derelicts, on account of the difficulty of pursuing them; especially as it is impossible to know our beasts from others. But this conjecture may be refuted by

L. Nat. 5. § 1.  
D. de Acq.  
Res. Dom.

ralis quædam possessio ad dominium adipiscendum; atque ideo vulnerasse non sufficit, ut recte contra Trebatium placuit. Hinc proverbium: *Aliis leporem excitasti*. Et Ovidio *Metamorphoseon* quinto aliud est scire ubi sit, aliud reperire.

J. de Leq. 55.  
D. de Acq.  
Res. Dom.

IV. Sed possessio illa potest acquiri non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis, dum duo adsint: primum, ut ipsa instrumenta sint in nostra potestate, deinde, ut fera ita inclusa sit, ut exire inde nequeat: ad quem modum definienda est quæstio de apro, qui in laqueum incidit.

Hort. et alii  
in c. non est  
de decim.  
Jacon Cons.  
119.

V. Hæc ergo locum habebunt si lex nulla civilis inter- venerit: valde enim falluntur recentiores Jurisconsulti, qui hæc ita putant naturalia, ut mutari nequeant: sunt enim naturalia non simpliciter, sed pro certo rerum statu, id est, si aliter cautum non sit. Germaniæ autem populi, cum princi-

γενέσθαι δεσπότην τοῦ θηρίου, εἰ μὴ καὶ τοῦτον δράξεται: non aliter enim dominus fera fit qui vulneravit, nisi et ceperit.

[*Aliis leporem excitasti*] Est apud Petronium. (Cap. 131. *Ed. Burm.*) Ovidius (*Art. Am.* 111. 661):

Et lepus hic allis exagitatus erit.

Langobardorum jure, qui feram ab alio vulneratam occidit aut reperit, aufert dextrum armum cum septem costis. In reliqua is qui vulneravit jus habet, sed non nisi intra horas xxiv. (*Lib. 1. Tit. xxii. Leg. 4, 6.*)

<sup>3</sup> De universo jure *Occupationis* vide PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. 6. ubi in *Notis*, præcipue alterius Editionis, naturam et effectus ejus accuratius exposuimus. *J. B.*

<sup>5</sup> *Sapienter existimarunt, ab illis rebus incipiendum, quæ sine damno cujusquam tribui possunt*] Sed de vitioso usu hujus juris vide Sarisberiensem *Policratico*, (*Lib. 1. c. 4.*)

<sup>4</sup> Procurator ille non erat veterum Regum Ægypti minister, sed Imperatorum Romanorum, ex eo tempore constitutus, quo in formam provinciæ regio

other evidence: as if the beast be *marked*, or have a bell hung to it; as we know that deer and hawks have sometimes had, and thereby have been restored to the owners.

Some corporeal possession is required to make the ownership complete; and therefore it is not enough to have wounded them, as is rightly held, in opposition to Trebatius. Hence the proverb, *You started the hare for him to catch*. And so Ovid.

IV. But a possession which gives ownership may be acquired, not by the hands alone, but by instruments, as traps, snares, nets; on two conditions; first, that the instruments be in our power; next, that the creature be so caught that he cannot escape. And by this rule is to be decided the question of the boar which fell into the snare.

V. This is the rule, if no Civil Law intervene: for jurists are much mistaken who think that it is so decidedly Natural Law that it cannot be changed. It is Natural Law, not simply, but in a certain

pibus ac regibus bona quædam essent assignanda, unde dignitatem suam sustinerent, sapienter existimarunt ab illis rebus incipiendum, quæ sine damno cujusquam tribui possint, cujusmodi sunt res omnes quæ in dominium nullius pervenerunt. Quo jure usos et Ægyptios video. Nam et ibi regum procurator, quem ἴδιον λόγον vocabant, vindicabat res ejus generis. Potuit autem lex etiam ante occupationem harum rerum dominium transferre, cum ad dominium producendum lex sola sufficiat.

Strabo, xvii.

Covar. in c. Peccat. part. 2. § 4.

VI. Quo modo feræ, eodem acquiruntur<sup>h</sup> et alia ἀδέσποτα, id est, res hero carentes. Nam et hæ, si naturam solam sequimur, sunt invenientis et occupantis. Sic Acanthos insula deserta adjudicata est Chalcidensibus, qui priores intraverant, non Andriis qui priores jaculum immiserant: quia possessionis initium est corporis ad corpus adjunctio, qualis circa res mobiles maxime fit manibus, circa res soli

Plut. Quæst. Gr. 29.

illa redacta est: Ἄλλος δ' ἐστὶν ὁ προσαγορευόμενος Ἴδιος λόγος, ὃς τῶν ἀδέσποτων, καὶ τῶν εἰς Καίσαρα πίπτειν ὀφειλόντων, ἕξτασθῆς ἐστὶ. STRAB. Geogr. Lib. xvii. Pag. 797. Ed. Paris. Idemque erat, qui in Pandectis dicitur Procurator Cæsaris vel Rationalis, ut recte observavit Casaubonus; quem vide et Not. in LAMPRIJ. Alex. Sever. c. 45, et CAPITOLIN. Maximin. duob. c. 14. Fefellit Auctorem nostrum, quod paullo post apud Strabonem legitur: Ἦσαν δ' οὖν καὶ ἐπὶ τῶν

Βασιλέων αὐταὶ αἱ ἀρχαί. Sed ibi agitur de Magistratibus indigenis, τῶν δὲ ἐπιχωρίων ἀρχόντων, qui manifesto discernuntur a Romanis, quos Cæsares Ægypto imponebant. J. B.

<sup>h</sup> Et alia ἀδέσποτα] Balens ejectæ regis sunt in Lusitania. Georgius de Cabedo, decis. Luvit. Parte II. Dec. xlviij.

<sup>5</sup> Non est insula Acanthos, sed urbs Macedonia, prope mare, versus sinum Strymonicum. J. B.

state of things, that is, if it be not otherwise provided. But the peoples of Germany, when they wished to assign to their princes and kings some rights to sustain their dignity, wisely thought that they might best begin with those things which can be given without damage to any one; of which kind are the things which have not yet become the property of any; [and thence they gave them a right to the game]. And this too was what the Egyptians did. For there the king's procurator claimed things of that kind. The law might transfer the ownership of these things even before occupation, since the law alone is sufficient to produce ownership.

VI. Other ἀδέσποτα, ownerless things, are acquired in the same way as game. For these too, if we follow nature alone, belong to him who finds them and takes possession. Thus Acanthos was adjudged to the Chalcidians who entered it first, not to the Andrians who first cast a javelin into it: for the beginning of possession is the contact of

pedibus. Scire ubi res est non est reperire, ut habemus apud Ovidium *Metam.* v.

L. III. de Acq.  
Pos.

VII. Inter ἀδέσποτα sunt et thesauri, id est, pecuniæ quarum dominus ignoratur: quod autem non apparet pro eo est quasi non sit: quare et thesauri naturaliter fiunt inventoris, id est, ejus, qui loco moverit apprehenderitque. Neque tamen id obstat quo minus <sup>1</sup>legibus aut moribus aliud constitui possit. Plato magistratibus indicium fieri vult, et oraculum consuli: et Apollonius thesaurum quasi Dei beneficium ei adjudicabat qui ipsi optimus videbatur. Apud Hebræos receptum, <sup>k</sup>ut domino agri thesaurus cederet, videtur colligi posse ex Christi parabola, <sup>6</sup>quæ extat Matthæi xiii. Idemque in Syria juris fuisse colligo ex historia, quæ est apud Philostratum libro VI. cap. xvi. Romanorum Imperatorum leges valde hæc in parte variarunt; quod partim constitutiones ostendunt, partim <sup>1</sup>historiæ <sup>m</sup>Lampridii, Zonaræ, Cedreni.

Philostr. II.  
18, 38.

Cap. 30.

In Neræ.  
In Nicephor.

<sup>1</sup> Legibus aut moribus] Bybliorum lex, quod non posuisti, ne tollas. Probat id Apollonius apud Philostratum. [Lex non est Bybliorum, sed Stagyritarum, referente ÆLIANO, Var. Hist. III. 46. Byblij vero idem habebant in more, IV. 1. p. 302. Ed. Perizon. Locus autem PHILOSTRATI idem est, qui in ora libri indicatur: ubi etiam de casu tantum singulari agitur. J. B.]

<sup>k</sup> Ut domino agri thesaurus cederet] Id jus etiam Romæ obtinuisse videtur Plauti tempore. Ait enim Callicles

(Trinumem. I. 2, 141):

Qui eminet, ejus casnetæ ea pecunia?

Deinde (*Ibid.* v. 2, 22):

Atque eum a me lege populi patrium poecret,

Emtor ædium, thesaurum.

<sup>6</sup> Non satis tuto ex illa parabola hoc colligi potest. Vide quæ diximus in PUFENDORF. *De Jure Nat. et Gent.* Lib. v. cap. iii. § 3. Not. 2. J. B.

<sup>1</sup> Historiæ] Vide Tacitum de thesauris in Africa quos Nero spe devoraverat, *Annalium* XVI. c. 1. Vide Philo-

body with body, which, with regard to moveables, is mostly performed with our hands, with regard to the soil, with our feet.

VII. Among ownerless things is *treasure trovæ* that is, money of which the owner is unknown; for what does not appear is, so far, as if it did not exist. Hence by Natural Law such treasure belongs to the finder, that is, him who took hold of it or took it up. Nor is it an objection, that by laws and customs other rules may be established. Plato directs that the fact shall be reported to the magistrates, and the oracle consulted; and Apollonius adjudged it, as a boon of the gods, to him whom he thought the best man. That among the Hebrews the received rule was that the treasure should go to the owner of the soil, appears to follow from the parable, Matth. xiii. The same was the case in Syria. See Philostratus. The Laws of the Roman Emperors varied much on this point; as appears partly by the constitutions, and partly by the histories of Lampridius, Zonaras and Cedrenus.

Germaniæ populi thesauros, ut et alia ἀδέσποτα addixerunt principi: atque id nunc jus commune est, et quasi gentium. Nam et in Germania, et Gallia, et Anglia, et Hispania, et in Dania id observatur. Quod cur injuriæ accusari non possit satis jam diximus.

Th. 2. 2. 66. 6.  
et *ibid.* Cajet.  
Covar. in c.  
Peccat. p. 3.  
§ 2.

VIII. Veniamus ad fluvialia incrementa, de quibus complura extant jurisconsultorum veterum rescripta, recentiorum etiam integri commentarii. Quæ vero in hoc argumento ab ipsis sunt tradita, ea magnam partem omnia sunt ex instituto quarundam gentium, neutiquam a naturali jure; quamquam ipsi sæpe sua instituta eo nomine venditant. Nam plurimæ eorum definitiones hoc fundamento nituntur, quod ut ripæ sint proximos fundos possidentium, et ipsi alvei simul atque a flumine derelicti sunt: cui consequens est, ut et insulæ in flumine natæ sint eorundem. Tum vero in fluminis inundatione distinguunt, ut levis quidem dominium non auferat,

Bart. Tyber.  
Bapt.  
Aym. *de all.*  
Jure Con. l.  
iii. Jur. Civ.  
c. 5.

L. Adeo. 7.  
D. de Acq.  
Rev. Dom.

stratum, de Vita Attici, (Vit. Sophist. ii. 1, 2) quem locum Zonaras transcripsit in Nerva.

■ Lampridii] In Adriano et Severo. [c. 46. sed Vita Hadriani, in qua de hac re agitur, c. 18. est Spartiani, ut omnes norunt.]

■ In Germania] Vide Speculum Saxonicum, c. 35. Constitutiones Siculæ Friderici, Lib. 1. Tit. lviii. et clix. [Nullus est Tit. 103 in eo Lib. 1.] Idem Gotthis mos. Rex Theuderichus apud Cassiodorum iv. 34. Non est cupiditas

eripere quæ nullus se dominus ingemiscat amisisse. Idem vi. 8. Depositiones quoque pecuniæ, quæ longa vetustate competentes dominos amiserunt, inquisitione tua nostris applicentur ærariis, ut quia sua cunctos patimur possidere, aliena nobis debeant libenter offerre: sine damno siquidem inventa perdit, qui propria non amittit.

○ Recentiorum etiam integri commentarii] Johannis Boreo, Antonii Marsæ, Johannis Gryphiandri, præter ea quorum nomina sunt in textus margine.

The peoples of Germany gave treasure trove, like other ownerless things, to the prince; and that is now the common law, as a sort of *jus gentium*. For it is observed in Germany, France, England, Spain, and Denmark. And that there is in this no wrong done, we have sufficiently explained.

VIII. Let us now come to the additions made to land by rivers; on which subject there are very many rescripts [opinions on cases] of the old jurists, and of the moderns, whole books. But the rules delivered on this subject by them are, for the most part, instituted rules of certain nations, not Natural Law; although they often give their rules as Natural Laws. For many of their determinations rest on this foundation, that the banks belong to the nearest landowners, and also the bed of the river when deserted by the stream: from which it follows that the islands which make their appearance in the river belong to the same persons. Thus in the inundation of a river they make a



D. l. Adeo, 7.  
§ 5. Quod si  
l. ergo l. Ali.  
38. eod. Tit.

major auferat: sed ita, ut si fluvius uno recedat impetu, postliminio fundus, qui mersus fuerat, ad dominum redeat; si paulatim, non item: imo proximis possessoribus accedat: quæ omnia lege potuisse introduci, et <sup>p</sup>utilitate quadam muniendarum riparum defendi, non nego; naturalia esse, quod ipsi sentire videntur, minime concedo.

Vide supra  
hoc Lib. c. 3.  
in fin.

De Benef.  
vii. 4.

De Offic. l. 7.

p. 385 c.

Germ. 26.

IX. 1 Nam si id quod plerumque est respicimus, <sup>q</sup>7 prius populi terras occuparunt, nec imperio tantum, sed et dominio, quam in privatos agri describerentur. *Fines*, inquit Seneca, *Atheniensium aut Campanorum vocamus, quos deinde inter se vicini privata terminatione distinguunt.* Sic et Cicero: *Sunt autem privata nulla natura; sed aut veteri occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello potiti sunt; aut lege, pactione, conditione, sorte: ex quo fit, ut ager Arpinas Arpinatum dicatur, Tusculanus Tusculanorum: similisque est privatarum possessionum descriptio.* Dion Prusæensis Rhodiaca: πολλά ἐστὶν εὐρεῖν, ἃ κοινῇ μὲν ἀπεγράψατο ἡ πόλις, διήρηται δὲ εἰς τοὺς κατὰ μέρος, ὅλως δὲ οὐκ ἔστιν ἵνα μὴ multa inveniri possunt quæ universim civitas sua censet, in singulos autem dominos partitim divisa sunt. Tacitus de

<sup>p</sup> Utilitate quadam muniendarum riparum] Vide locum Cassii apud Aggenum Urbicum (pag. 56, 57. in *Auct. Rei Agrar. Ed. Gois.*) et Boëthium (*De Geometr. Lib. II. Pag. 1231. Edit.*

*Opp. Basil. 1546).*

<sup>q</sup> Prius terras populi occuparent] Vide quæ supra in textu et notis cap. iii. § 19.

<sup>7</sup> Contrarium verius est. Vide quæ

distinction that a small inundation does not take away ownership, a large one does; but so that if the river retires by a single impulse, the ground which was flooded returns to the owner by *postliminium*, [a resumption of the previous condition of property:] if the river recedes gradually, it is not so; but, on the contrary, passes to the nearest land-owners. That all this might be established by law, and defended by the consideration of its being a useful rule for the preservation of the banks, I do not deny: that it is Natural Law, which they seem to think, I by no means concede.

IX. 1 For if we look at the general case, peoples occupied the land, not only as lords, but as owners, before it was assigned to private proprietors\*. Seneca, Cicero, Dio Prusæensis, Tacitus, speak of the occupation of land by peoples. [See.] What was thus occupied by peoples, and was not afterwards distributed, is to be considered as belonging to the people; and as in a river which is private property,

\* As Barbeyrac says, the contrary is more nearly true. W.

*Germanis: Agri pro numero cultorum ab universis per vicos (male vices legitur) occupantur, quos mox inter se secundum dignationem partiuntur.* Quamobrem quæ primitus a populo sunt occupata, neque postmodum distributa, ea censenda sunt propria esse populi; ac sicut in privati juris flumine nata insula, aut derelictus alveus privatorum est: ita in publico utrumque est populi, aut ejus, cui populus dedit.

2 Quod autem de alveo diximus, <sup>r</sup>idem et de ripa tenendum est, quæ pars est extrema alvei, id est, quo naturaliter flumen excurrit. Atque ita videmus nunc passim usurpari. In Hollandia et vicinis regionibus, ubi frequentissimæ antiquitus fuerunt hujus generis controversiæ ob depressum solum, magnitudinem amnium, et vicinitatem maris, limum hinc recipientis, illuc revehenti per sæstum vices, semper constitit insulas, quæ vere insulæ essent, esse in patrimonio publico. Nec minus derelictos alveos totos Rheni ac Mosæ, quod sæpius judicatum est: et ratione optima nititur.

3 Nam et ipsi Romani Jurisconsulti concedunt, insulam, <sup>q</sup>uæ in flumine natat, puta, virgultis sustentata, esse publicam; quia cujus juris sit flumen, ejus esse debeat et insula

*L. 65, § 1. et § ult. de Acq. Rev. Dom. L. 1, § 7. Sicuti. modis. D. de Flum.*

observavimus in PUFENDORF. *De Jure Nat. et Gent.* Lib. IV. cap. 7. § 12. Not. 1. alterius edit. Et confer quæ Auctor ibi dicit de toto isto argumento. *J. B.*

<sup>r</sup> *Idem et de ripa tenendum est*] Sic

in Gallia obtinet: *Sanction des eaux et forests*, Lib. II. c. 1.

<sup>q</sup> *Quæ in flumine natat*] Descriptio natantium insularum apud Senecam naturalium III. 25. Plinium majorem

an island which makes its appearance, or a deserted river-bed, is the property of the private person; so in a public river, both of these belong to the people, or to him to whom the people has given them.

2 What we have said of the bed of the river, is true also of the bank, which is only the extreme portion of the bed, that is, where the river naturally stops. And we find that this is now the general usage. In Holland, and the neighbouring countries, where of old these controversies were more frequent on account of the lowness of the land, the magnitude of the rivers, and the neighbourhood of the sea, which receives the mud carried down, and brings it back by the reflux of the tide, it was always settled that islands which were true islands were the public property; and in like manner, the deserted beds of the Rhine and the Meuse; which has often been adjudged, and rests on the soundest reasons.

3 For even the Roman jurists allow that an island which floats in a river, for instance, one resting on roots and branches, is public pro-

in flumine nata. Atqui alvei et fluminis eadem est ratio, non ea tantum ex parte quam Romani Jurisconsulti considerant, quia alveus flumine tegitur, verum alia, quam supra attulimus, quod hæc simul a populo occupata sunt, nec in privatum dominium transierunt: quare nec illud recipimus ut naturale, quod aiunt, si limitati fuerint agri, insulam esse occupantis. Id enim ita demum haberet locum, si flumen ipsum et cum eo alveus populo occupati non essent, sicut in mari nata insula fit occupantis.

L. 1. § Si  
Insul. 6. D.  
de Flum.

X. 1 Nec magis admittendum est illud de graviore inundatione, si naturalem tantum rationem sequimur. Nam ut maxime summa pars agri in arenam dissolvatur, manet tamen solida pars fundi inferior; et, ut de qualitate aliquid mutet, substantiam non mutat, non magis quam pars agri quæ a lacu hauritur, cujus jus non mutari Romani recte sentiunt. Neque illud naturale est quod aiunt "flumina censorum vice fungi, et de publico in privatum, de privato in publicum addicere. Melius Ægyptii, de quibus hæc sunt apud Strabonem: ἐδέησε δὲ τῆς ἐπ' ἀκριβῆς καὶ κατὰ λεπ-

L. Lacus. 12.  
D. de Acq.  
Rer. Dom.  
L. Vicia. 94.  
§ Fin. D. de  
Aqua pl. l.  
Rutil. Poll.  
69. D. de  
Cond. Empt.  
Geogr. xvii.  
p. 707.

Lib. II. c. 95. Macrobius i. *Saturnali-um* i. 7. Elegans talium in Vadimone lacu insularum descriptio apud Plinium minorem Lib. VIII. c. 20. et Flandricarum in libro lectu digno Chiffletii.

Si flumen ipsum et cum eo alveus a populo occupati non essent] Siculo Flaccus libro *De Conditionibus Agrorum*

(Pag. 18, 19): *In quibusdam regionibus fluminis modus assignationi cessit: in quibusdam autem tantum subsecivus relictus est. Aliis autem exceptus, inscriptumque flumini illi tantum.* De subsecivis vide egregia quæ habet, ut omnia sunt illius, Salmasius ad *Solinum*. [Adde *Wilhelmi Goëssii, Antiquitates*

party; because the party who has a right to the river has a right also to an island produced in the river. But the same reason holds for the bed as for the river: not only in the way in which the Roman jurists take it, because the bed is covered by the river, but for another, which we have mentioned above; that the bed and the river were occupied at the same time by the people, and have not since passed into private ownership. And therefore we do not accept as Natural Law what they say, that if the lands are marked by boundaries, the island belongs to him who takes possession of it. That would be so, only if the river and the bed of the river were not already occupied by the people; as an island which rises in the sea belongs to him who takes possession of it.

X. 1 Nor can we admit that doctrine above stated concerning a very grave inundation, if we only follow natural reason. For mostly, though the surface part of the ground is dissolved into sand, the lower solid part of the soil remains; and though it may in some

τὸν διαιρέσεως, διὰ τὰς συνεχεῖς τῶν ὄρων συγχύσεις, ἃς ὁ Νεῖλος ἀπεργάζεται κατὰ τὰς αὐξήσεις, ἀφαιρῶν καὶ προστιθεῖς, καὶ ἐναλλάττων τὰ σχήματα, καὶ τᾶλλα σημεῖα ἀποκρῦπτων, οἷς διακρίνεται τὸ τε ἀλλότριον καὶ τὸ ἴδιον. ἀνάγκη δὴ ἀναμετρεῖσθαι πάλιν καὶ πάλιν.

*Opus fuit exacta et subtili agrorum divisione, eo quod Nilus per incrementa sua addens, minuens, faciemque ac signa immutans, confundat terminos quibus suum atque alienum alibi internoscitur. Ideo et repetenda sæpe fuit dimensio.*

2 Ab hac sententia non dissentit quod ipsi Romani auctores tradiderunt, quod nostrum est, nostrum esse non desinere nisi facto nostro, adde, aut lege. Sub factis autem et non facta comprehendendi supra diximus, quatenus conjecturam adferunt voluntatis. Quare hoc damus, si gravissima sit inundatio, neque alia signa sint, quæ retinendi domini animi notent, facile præsumi agrum habitum derelictui; quæ æstimatio sicut naturaliter indefinita est ob varietatem circumstantiarum, et viri boni arbitrio permittenda, ita legibus

L. 9. D. De  
Div. Reg.  
Jur.

*Agrarias*, ubi accuratius rem pertractavit. *J. B.*] De toto hoc argumento fluviorum et fluvialium incrementorum videat, si cui vacat, Rosenthalium *De Jure Feudorum*, cap. v. concl. 23. Sixtinum *De Regalibus* libro II. cap. 3. Cæpollam *De Servitutibus Rusticorum*

*Praediorum*, c. 31.

<sup>u</sup> *Flumina censorum vice fungi*  
De agri mensore Cassiodorus: *Mores vastissimi fluminis aliis spatia tollit, aliis jura concedit.* [Var. III. 52. ubi alii legunt, *rura concedit, aut terram.*]

measure change the quality, it does not change the substance, any more than a part of the land from which a lake is drained, the right to which is not changed by such a process, as the Romans rightly decide. Nor is that Natural Law which they say, that the rivers, like the collectors of a land-tax [who have to seize and sell the property of defaulters, *Gron.*] increase private property by public, and public by private. The Egyptians judged better, who made a measurement and division of the land, which was independent of the inundations.

2 There is nothing contrary to this opinion in what the Roman writers have delivered, that what is ours does not cease to be ours except by our own act; add, or by law. But among our acts are included also the things which we do not do, so far as they supply a conjecture of the will. Wherefore we grant this, that if the inundation be very grave, and if there are no other signs which imply an intention of retaining the ownership, the land may easily be presumed to be a derelict; and this estimation, as it is naturally indefinite from the

civilibus definiri solet. Sic in Hollandia derelictus habetur ager, qui per decem annos mersus fuerit, si non aliqua extent signa continuatæ possessionis: quo in genere receptum apud nos non immerito est, quod Romani rejiciunt, ut, si aliter nequeat, vel piscando retineri possessio censeatur. Sed solebant principes tempus præfigere, intra quod veteres agrorum possessores siccare agros deberent: qui ni id facerent tum monebantur qui in agros jus pignoris habebant, deinde hi qui jurisdictionem aut civilem tantum, aut etiam criminalem: qui si omnes in mora essent, tum eorum jus omne ad principem deferabatur: atque is aut ipse agros siccabat, sui-que patrimonii faciebat, aut aliis siccandos dabat retenta parte.

L. Si ager.  
23. D. Qui.  
Mod. Usus.  
Amitt.

XI. De alluvione, hoc est, de adjectione particularum quæ a nullo vindicari possunt, quia unde veniant nescitur, (alioqui enim naturaliter dominium non mutabunt) certum haberi debet hanc quoque esse populi, si modo populus flumen dominio occupaverit, quod in dubio credendum est; alioqui occupantis.

L. 4. D. Si  
Cert. Pet. L.  
30. § 2. D. de  
Acq. Rer.  
Dom. L. 7.  
§ 1. eod. Tit.

XII. 1 Sed populus ut aliis, ita et proxima prædia

variety of circumstances, and one of those things which must be left to the judgment of a fair man, so is it often defined by the Civil Law. Thus in Holland land is held to be derelict, if it has been under water for ten years, and there are no signs of continuation of possession: and in this case we reasonably accept a rule which the Romans reject; that if you can do nothing else, you may be supposed to retain possession by fishing over it. So princes were accustomed to appoint a time within which the ancient possessors were bound to free their lands from water: and if they did not do this, warning was given, first to those who had mortgages upon the land, next to those who had jurisdiction, either civil only, or criminal also; and if all these parties were behindhand in doing what the law required, the whole right of the property passed to the prince: and he either drained the lands himself, and added them to his patrimony, or gave them to others to be drained, retaining a part of the profit.

XI. Concerning alluvium, that is, the addition of particles which cannot be claimed by any one, because it is unknown whence they come, (for otherwise the part would not, by Natural Law, change its owner,) it should be considered as certain that this also belongs to the people, if the people have assumed possession of the river as owner, which in a case of doubt is to be supposed; otherwise, the property of him who takes possession of it.

possidentibus jus illud concedere potest, et concessisse haud dubie videtur, si agri illi non alium finem ea ex parte quam naturalem, id est, flumen ipsum habeant. Quare non contemnenda est hac in parte Romanorum diligentia, qui limitatum agrum ab aliis agris distinxerunt, dummodo meminimus, agrum mensura comprehensum hac in re paris juris esse cum limitato. Nam quæ de imperiis supra diximus, cum de eorum occupatione ageremus, eadem et in agris privatis obtinent: sed hoc adhibito discrimine, quod imperia in re dubia credenda sunt esse arcifinia, quia id territorii naturæ maxime convenit: at agri privati magis est ut arcifinii non credantur, sed aut limitati, aut certa mensura terminati, quia hoc privatarum possessionum naturæ est congruentius.

L. 16. D. de  
Acq. Rev.  
Dom. L. 1.  
§ 6. D. de  
Flum. Bald.  
in c. Si quis  
de Manu. § 1.  
Si de Jur.  
Feud. Cont.  
Fuerit.

2 Neque tamen negamus fieri posse, ut populus agrum assignet eo jure quo ipse occupaverat, id est, ad flumen usque; et si id appareat, jus esse alluvionis: quod in Hollandia ante sæcula aliquot judicatum est de agris ad Mosam et Isalam sitis: quia et in literis mancipationum, et in libris censualibus semper dicti erant ad flumen pertingere. Et tales agri si vendantur, quamvis in lege emtionis mensura

XII. 1 But as the people may concede this right to others, so undoubtedly it may concede it to the possessors of the adjacent lands; and it is supposed to have done so, if those lands have no other boundary on that side than the natural boundary, that is, the river. Wherefore we are not to despise the laborious discussion of this subject by the Romans; in which they have distinguished *limitatum*, land bounded by artificial limits, from other lands; provided we recollect that land *mensura comprehensum*, determined by its measured quantity, (see II. iii. xvi.) is governed by the same rule as *limitate* land. For what we said before of ownership, when we spoke of occupation, obtains also with regard to private lands: adding this difference, that lordships (*imperia*) are, in a doubtful case, to be supposed to be *arcifinial*, bounded by natural limits, because that best agrees with the nature of the territory: but private lands are rather supposed not to be naturally bounded, but either *limitate*, or determined by measure; for this is more congruous to the nature of private possession.

2 We do not deny that it may be that a people assigns land to a private person by the same rule by which it had itself occupied it, that is, up to the river; and if that is the case, the possessor has a right to the alluvium: which, in Holland, was some generations ago adjudged to be the case with the lands between the Meuse and the Yssel, because these, both in the leases and in the records of the land-

aliqua nominata fuerit, dum tamen vendantur, non ad mensuram, sed suo corporis nomine, naturam suam et jus alluvionis retinent, quod Romanis quoque legibus proditum est, et passim usurpatur.

L. Julian. 13.  
§ 4. *Si Tit.  
Fund. D. de  
Act. Em. et  
Vend.*

XIII. Quod de alluvione diximus, id et de relicta ripa et siccata parte alvei censendum est, ut in non occupatis sint ea occupantis: in fluminibus occupatis, populi: privatorum autem ita demum, si a populo, aut jus populi habente, agrum ad flumen excurrentem, qua talem acceperint.

XIV. Sed cum aliud esse jus dixerimus insulæ, aliud vero alluvionis, frequens hinc controversia oritur, utro nomine censendum sit, quod, cum emineat nonnihil, cum proximis prædiis ita cohæret, ut tamen interjecta planities aquis superfundatur: quod passim apud nos ob locorum inæqualitatem videmus accidere. Mores hic variant. In Gelria prædiis accedit, addita occupatione, id quod plaustro onerato adiri potest: in agro Putteno <sup>x</sup>id quo pedes gladium exsertum tenens potest pertingere. Maxime naturale est, ut discre-

<sup>x</sup> *Id quo pedes gladium exsertum tenens potest pertingere*] Ex vetustissimo Germanicarum gentium more. Paulus Warnefredi de Authari rege Langobardorum: *Usque ad eam* (columnam in

*mari) equo sedens accessit Autharis, eamque de hastæ suæ cuspidē tetigit, dicens: usque hic erunt Langobardorum fines.* (Lib. III. cap. 33). Similem historiam habes de lancea, qua in

tax, are always said to reach to the river. And if such lands be sold, although, in the articles of sale, some measure be mentioned, yet since they are sold, not by measure but bodily, they retain their nature and right of alluvium: which is also declared in the Roman Law, and everywhere acted on as usage.

XIII. What we have said of alluvium, is also to be considered to apply to a deserted river-bank and a part of the bed dried up; namely that, in places not occupied, they belong to him who takes possession; in occupied rivers, to the people; and to private persons only if they have received from the people, or from one who derives right from the people, land running on to the river, as such.

XIV. But since we have said that the rule respecting an island is different from the rule for alluvium, a controversy often arises which of the two a piece of ground is, when there is an elevated promontory connected with the nearest land by a plain which is under water: which perpetually happens with us on account of the inequality of the ground. Here usages vary. In Gueldres it becomes part of the land, provided it be occupied and can be visited with a loaded cart: in the land of Putten, as far as a man on foot with a sword in his hand can reach. The most natural rule is, that an island should

tum videatur id qua majori temporis parte navigio transiri solet.

XV. 1 Nec minus trita usu quæstio est inter principem qui jure populi utitur, et ejus vasallos qui imperium summo minus acceperunt. In imperii sola concessione fluvialia incrementa non inesse satis apertum est. Sed notandum est, horum vasallorum nonnullos cum illo definito imperio simul accepisse agrorum universitatem, salvo eo quod privatis competit, puta quod ager is olim populi aut principis fuerit, aut a principe siccatus. Et hoc casu dubium non est, quin vassalli jus habeant quod populi aut principis fuit. Ac sic videmus in Zelandia vasallos, etiam qui de civilibus tantum judices dant, pro tota agrorum universitate tributum pendere: cujus partem a singulis pro privatarum possessionum modo ferunt. Et his de alluvionibus non movetur controversia.

Sunt quibus flumen ipsum datum est, qui proinde insulas sive limo aggestas, sive factas ex alveo, quem amnis circumluit, suas recte dicunt.

mare jacta Otto Imperator fines imperii in freto Baltico designare se dixit, apud Saxonem libro x. et alios. [Hoc tantum dicit Saxo *Grammat. Hastam, cujus*

*usum habebat, maritimos in fluctus, relinquendi monumenti gratia, jaculatus, suum freto vocabulum indidit. Pag. 165. Ed. Wech. 1576.]*

be considered as separate from the land when there is a strait through which a ship can commonly pass.

XV. 1 No less frequent is the question between the sovereign prince, and his vassals who have subordinate authority. That the mere concession of sovereignty does not carry with it the increase made by rivers, is plain enough. But it is to be noted that some vassals have received, with their definite authority, the right to the whole land, saving what belongs to private persons; it may be, because the land formerly belonged to the prince or to the people, or was drained by the people. In this case it is not doubtful that the vassals have the same rights which the prince or the people had. And thus we see in Zealand, vassals who have only civil jurisdiction, [not criminal,] still pay the land-taxes for the whole of the land; of which they in return claim a part from private possessors according to their holdings. And in such cases there is no question about the right of alluvium.

In some cases, the river is given to a person, and then of course he rightly claims the islands that are produced, whether arising from accumulated mud, or parts of the bed which the river leaves.

2 There are other persons whose grant does not comprehend either



2 Sunt alii, in quorum investitura nec hoc nec illud comprehensum est, et horum adversus fiscum mala causa est, nisi aut mos regionis illis faveat, aut longi satis serie temporis possessio, accedentibus quæ oportet, jus pepererit.

Quod si non imperium, sed ager in feudum datus sit, videndum quæ sit agri natura, ut supra diximus. Nam is si est *arcifinius*, alluvio feudo comprehensa censebitur, non ex jure peculiari principis, sed ex agri qualitate: nam et usufructuario tali casu alluvio prodesset.

L. 9. Item si  
Fund. § 4.  
Hinc Vicin.  
D. De Uryf.

XVI. Solent <sup>9</sup>Romani, ut jus, quo utuntur ipsi, pro-  
bent esse naturale, tritum illud pronuntiatum afferre: Secun-  
dum naturam est, ut cujusque rei eum sequantur commoda,  
quem sequuntur incommoda: quare cum amnis de agro meo  
sæpe partem deterat, æquum esse ut ejus beneficio utar.  
Sed ea regula locum non habet, nisi ubi ex re nostra com-  
moda existunt: at hic existunt e flumine quod alienum est.  
Quod autem perit, domino perire, id vero naturale est. De-  
nique non esse universale quod adferunt, ipsa ostendit ad-  
missa ab ipsis agrorum limitatorum exceptio: ut jam omittam  
ita plerumque evenire, ut alios flumen ditet, alios pauperet.

Phars. vi. 377. Lucanus :

Illos terra fugit dominos, his rura colonis  
Accedunt donante Pado.

<sup>9</sup> Non ipsi Jcti veteres, sed recen-  
tiores Interpretes. Nam Romani eo  
principio nitebantur, quod Alveus pars

Ripæ censeatur. J. B.

7 Quod a Romanis] Cum quibus  
consentit c. 31. Caroli Calvi edicto Pis-

the one or the other of these things: and these have no case against the public; except either the custom of that country favours them, or a long possession, with due circumstances, have generated a right.

But if it be not the authority or lordship, but the land which is granted as a fief, we must see what is the nature of the land, as above stated. If it is *arcifinial*, the alluvium is to be considered as comprehended in the grant, not by the peculiar right of the prince, but by the nature of the land: for a tenant for a term would in such case also enjoy the profits of alluvium.

XVI. The Romans, in order to prove their own Law to be Natural Law, are wont to adduce that trite maxim: It is according to nature that he should have the advantages of anything who has the disadvantages: wherefore, as the river may often carry away a part of my land, it is reasonable that I should take what it gives. But that rule does not hold, except when the advantages come from a thing which is ours; but here they come from the river, which belongs to

XVII. Sed et quod aiunt viam publicam non intercedere alluvioni, rationem naturalem nullam habet; nisi ager privatus sit qui viam debeat.

L. 38. D. de  
Adq. Rer.  
Dom.

XVIII. Est et acquirendi modus, inter eos qui juris gentium vocantur, per genituram animantium: qua in re quod a Romanis et aliis quibusdam gentibus est statutum, ut partus ventrem sequatur, non est naturale, ut supra diximus, nisi quatenus plerumque pater ignoratur. At si probabili ratione de eo constaret, cur non partus ex parte ad eum pertinere nihil potest afferri. Nam et patris partem esse quod nascitur certum est. Plusne vero de patre, an de matre habeat, inter Physicos disputatur. Plutarchus ea de re sic disserit: ἡ φύσις μίγνυσι διὰ τῶν σωματίων ἡμᾶς, ἢ ἐξ ἐκατέρων μέρος λαβοῦσα καὶ συγχέασα, κοινὸν ἀμφοτέροις ἀποδῶ τὸ γεγόμενον· ὥστε μηδέτερον διορίσαι, μηδὲ διακρίναι τὸ ἴδιον, ἢ τὸ ἀλλότριον. *Natura sexuum corpora miscet, ut ita de utroque parte sumta confundat, et commune utrisque reddit quod nascitur, ita ut neuter possit, quid suum sit, quid alienum, discernere.* Et hoc secutæ sunt veteres Francorum et Langobardorum leges.

Conf. Præc.  
p. 140 n.

tensi. De aliorum circa hanc rem legibus vide quæ supra in textu et notis c. v. hujus libri § 29.

<sup>2</sup> *Commune utrisque reddit*] Vide appositum ad hanc rem locum Galeni 11. de semine, et quæ ibi ex Athenæo.

another party. But that what is destroyed is lost to the owner, is Natural Law. And that what they allege is not universally applicable, appears by the exception, admitted by themselves, of limited land. The river enriches some, impoverishes others, as Lucan says.

XVII. What they further say, that even a public road [passing along the river-bank] does not bar the right of alluvium, is a doctrine for which there is no natural reason; except the private land be bound to keep up the road.

XVIII. There is another mode of acquisition, amongst those which are reckoned *juris gentium*, by the generation of animals: in which that which has been ruled by the Romans and some other nations, that the offspring follows the mother (as to property) is not Natural Law, as we have said above, (II. v. xxix.) except so far that the father is unknown in most cases. But if there were any probable certainty concerning him, no reason could be assigned why the offspring should not belong partly to him. For that what is born is part of the father is certain. Whether it derive more from the father or the mother is disputed among physiologists. So Plutarch. [See.] And this view was followed in the old laws of the Franks and Lombards.

XIX. 1 Si ex aliena materia speciem quis fecisset, Sabiniani dominium ejus esse volebant, qui materiæ fuisset dominus; Proculus ejus, qui speciem fecisset, quia per eum esse cœpisset quod ante non existeret: arrepta tandem est media sententia, ut si reverti ad priorem speciem materia posset, materiæ dominus rem haberet; si non posset, tum is haberet qui speciei esset auctor. Quod ipsum improbat Connanus, et hoc unum videri vult, plusne sit pretii in opere an in materia, ut quod pluris est id prævalentia sua quod minus est ad se trahat, argumento eorum quæ a Romanis quoque jurisconsultis de accessione tradita sunt.

Lib. III. 6.

2 At si naturalem veritatem respicimus, sicut confusis materiis communionem induci pro rata ejus quod quisque habeat, Romanis quoque jurisconsultis placuit, quia res alium exitum naturaliter reperire non poterat; ita cum res constant materia et specie tanquam suis partibus, si alterius sit materia, alterius species, sequitur naturaliter rem communem fieri pro rata ejus quanti unumquodque est. Species enim

Chrysostomus *ad v. Ephesiorum*: *μικτὰς κείνας μίξτα γενίττα φαίται ορίττα.* (Vers. *γένιττα των σπερμάτων τικτεται δ* 31. Tom. III. pag. 865 ).

XIX. 1 [There is a question concerning property in which materials and labour are mixed.]

If I make a new article of materials belonging to another, the Sabinians\* determined it to be the property of him to whom the materials belonged; Proculus, the property of me who gave it the new form, by which the article began to be what it is. But at last the medium opinion was accepted: that if the matter could return to its former shape, the owner of the material should have it; if it could not, then the person who was the author of the new form. But Connanus condemns this, and is for having this point alone considered; whether there be a greater amount of value in the workmanship or in the material; and for directing that that which is the more valuable should prevail, and draw to it that which is of less value; arguing by reference to the doctrines of the Roman jurists concerning value added to a thing.

2 But if we look at Natural Law merely, as the Roman jurists decided that when materials of two kinds belonging to two persons are indistinguishably mixed, there is a common property produced, in proportion to each person's share, because otherwise there could be no natural termination of the question: so when things consist of matter and form as their parts, if the matter belong to one, the form

\* The followers of Massurius Sabinus. Gronov.

pars est substantiæ, non substantia tota : quod Ulpianus vidit, cum dixit mutata forma prope interemtam substantiam.

*I. 9. Julian. § 3. Sed si quis. D. ad exhib.*

XX. Ut autem qui mala fide materiam alienam attrahant, speciem perdant, est quidem non inique constitutum, sed pœnale, atque ideo non naturale. Natura enim pœnas non determinat, nec ob delictum per se dominia aufert, quanquam naturaliter pœna aliqua digni sunt, qui delinquant.

*L. 12. de eo exhib. § 3. Si quis. D. ad exhib.*

XXI. Ut vero rei majori acquiratur res minor, quo fundamento Connanus nititur, naturale est facti, non juris : atque ideo qui fundi pro vicesima parte est dominus, tam manet dominus quam qui partes habet novendecim. Quare quod de accessione ob prævalentiam aut certis in casibus lex Romana constituit, aut in aliis etiam constitui potest, id naturale non est, sed civile, ad commodius transigenda negotia ; natura tamen non repugnante, quia lex dandi domini jus habet. Vix autem ulla est tractatio juris in qua tot discrepantes <sup>9</sup>sint jurisconsultorum sententiæ et errores. Nam quis concedat, si æs et aurum mixtum fuerit, alterum ab altero

<sup>9</sup> Nec mirum : quum in toto isto certo et solido niterentur. Vera, et ex jure Accessionis Veteres nullo principio ipsa naturali ratione petita, nobis vide-

to another, it follows by Natural Law that the article is common property, according to the share of value which belongs to each. For the form is part of the substance, but not the whole substance : which Ulpian saw, when he said that by the change of form the substance was *almost* destroyed.

XX. But that they who with fraudulent intent meddle with matter that belongs to another, lose their right to the form which they have given it, is indeed a rule not otherwise than equitable ; but it is a penal Law, and therefore not a Natural Law ; for Nature does not determine punishment, nor does she take away ownership for a delinquency *per se* ; though by Natural Law delinquents are worthy of some punishment.

XXI. But that the minor thing becomes an appendage to the major thing, which is the ground on which Connanus rests, is a natural rule in fact, but not in law. He who is part-owner of an estate, for a twentieth part only, is as much part-owner as he who has the nineteen parts. Wherefore all that is settled in the Roman Law, or may further be settled, about one part becoming an appendage to the other on account of the prevalence of value, is not Natural Law, but Civil Law, introduced for the convenience of business ; nature not repugning, because the law has the right of giving ownership. But there is scarce any part of law in which the opinions and errors of jurists

*L. Idem, § 1. D. de Rel. Vind.*  
*L. in Rem. 23. § Item, § 1. D. eod.*  
*Inst. de Rer. Div. § Litt. 33. et § 34. quæ, 34.*

diduci non posse, quod scripsit Ulpianus; aut ferruminatione confusionem fieri, quod Paulus; aut aliam esse scripturæ, aliam picturæ rationem, ut huic tabula cedat, illa tabulæ?

*L. Tit. 60. D. de Acq. Rer. Dom.*

XXII. Plantata et consita ut solo cedant, similiter est juris constituti, cujus ratio est quod ista solo alantur. Nam ideo et de arbore distinguitur, an radices egerit. Atqui alimentum rei jam ante existentis partem duntaxat facit: atque ideo sicut ex alimento jus quoddam in rem soli domino nascitur; ita domino seminis, plantæ, aut arboris jus suum naturaliter certe ob id non perit. Quare et hic communio locum habebit: nec minus in ædificio, cujus partes sunt solum et superficies: nam si mobile sit, nullum in eo jus habebit soli dominus, quod et Scævola placuit.

*L. Sed et si. 25. § Consul. 2. D. de Fel. Hered.*

XXIII. Bonæ fidei possessor ut fructus omnes ex re suos faciat quos percepit, naturale itidem non est, sed hoc tantum ut jus habeat, impendia in rem facta et operam

mur posuisse, in Notis ad PUFENDORFIUM. *De Jure Nat. et Gent.* Lib. IV. cap. 7. alterius Editionis: præsertim vero ad Compendium *De Officio Hom. et Civis*, Lib. I. cap. 12. § 7. not. 4. tertis et quartæ Edd. *J. B.*

<sup>a</sup> *Imo et exstantes, si aliter non fiat ei restitutio, retinendi.]* Vide hæc de re *Speculum Saxonicum*, in quo multa æquitatis plenissima. II. 46.

<sup>1</sup> Non mihi videtur. Sed de eo diximus in Notis Gallicis ad hunc locum. *J. B.*

are so various. For who will allow that if copper and gold are mixed together they cannot be separated, as Ulpian writes; or that in welding, [*ferruminatione*] there is an indistinguishable mixture, as Paulus; or that the rule is different for a written paper and a picture; the canvas being an appendage to the picture, but the writing to the paper?

XXII. That plantations and crops are appendages to the soil is similarly an established rule of law; of which the reason is, that they are nourished by the soil. On this account a distinction is made in a tree, according to whether it has shot out roots. But aliment makes only a part of a thing already existing: and therefore, as the owner of the soil acquires some right from the aliment supplied, so the owner of the seed, plant, or tree planted, does not thereby lose his right according to Natural Law. Therefore this too will be a case of common property: and in the same way in a house, of which the parts are the ground and the superstructure; for if the building be moveable, the owner of the soil has no right in it, as Scævola also decided.

XXIII. That a *bona fide* possessor, [one who believes that he has a right,] acquires a property in all the fruit or income which he draws from the property, is not Natural Law: but only so far as this; that he has a right to charge the expenses which he has bestowed upon the

utilem imputandi, ac pro iis deducendi fructus perceptos; \*imo et exstantes, si aliter non fiat ei restitutio, retinendi.

XXIV. Atque idem dicendum videtur <sup>1</sup>de malæ fidei possessore, ubi lex pœnalis non intercedit. *Benignius est*, L. 78 D. de Pet. ait Paulus Jurisconsultus, *etiam in prædonis persona haberi rationem impensarum; non enim debet petitor ex aliena jactura lucrum facere.*

XXV. Ultimus acquirendi modus qui juris gentium dicitur, est per traditionem. Atqui supra diximus, ad domini translationem <sup>b</sup>naturaliter traditionem non requiri; quod et ipse Jurisconsultus in quibusdam casibus agnoscunt, ut in re donata usufructu retento, aut in eum collata qui possideat, aut commodatam servet, in jactis missilibus: imo etiam ante adeptam possessionem nonnullis casibus nunc quoque transit dominium, ut hereditatis, legatorum, rei donatæ ecclesiis et piis locis, aut civitatibus, aut causa alimentorum, bonorum quorum universalis societas contracta est. L. 9 C. de L. 21. de Ac Dom. §. 44. Rer. L. C. §. 3. D. Poss. L. 4. de Fr L. ut C. de L. Si C. de quæ s. L. 1. §. 2. Socio

<sup>b</sup> *Naturaliter traditionem non requiri*] Non sane. Vide *legem Wisigothicam* Lib. v. tit. ii. c. 6. *Tum videtur vera esse traditio, quando jam apud illam scriptura donationis habetur. Et apud veteres Romanos res mancipi*

alienabantur plene per ses et libram. Vide Varronem Lib. vi. *de Lingua Latina* (pag. 82): Festum Pompeium in voce *Rodus*: Ulpianum *Institutionum* tit. XIX. Boethium *ad Topica Ciceronis*. (Lib. III. pag. 797).

property, and his useful labour, and of deducting them from the income received: and even of retaining the rising crop if repayment is not otherwise made.

XXIV. The same may be said of a possessor *malæ fide*, [who knows that he has not a right,] when the penal law does not interfere. *It is more considerate*, says Paulus the jurist, *that even in a man who has robbed us we should take account of his expenses; for the complainant ought not to derive gain from another's loss.*

XXV. The last mode of acquisition which is called *juris gentium* is by tradition or delivery. But we have said above that delivery is not required by Natural Law for the transfer of ownership; as indeed the Jurists themselves in some cases acknowledge: as in a thing which is given to another, while the present enjoyment of it is retained by the donor, or which is made over to a person who already holds it, or has it as a loan, or in things thrown among a crowd for them to catch. And in some cases, even now, a man may transfer the ownership before he is owner himself; as [by a certain Roman law,] in inheritances, legacies, things given to churches or pious places, or to communities, or for the sake of aliment, or in cases when a joint property in the goods is established.

XXVI. Hæc ideo annotavimus, ne quis reperta juris gentium voce apud Romani juris auctores statim id jus intelligat quod mutari non possit: sed diligenter distinguat naturalia præcepta ab his quæ pro certo statu sunt naturalia; et jura multis populis seorsim communia, ab his quæ societatis humanæ vinculum continent. Ceterum illud sciendum est, si hoc jure gentium improprie dicto, aut unius etiam populi lege introductus sit modus acquirendi, sine discrimine civis et peregrini, jam inde quoque exteris jus nasci: et si juris consecutio impediatur, injuriam etiam talem quæ justam belli causam præbere possit.

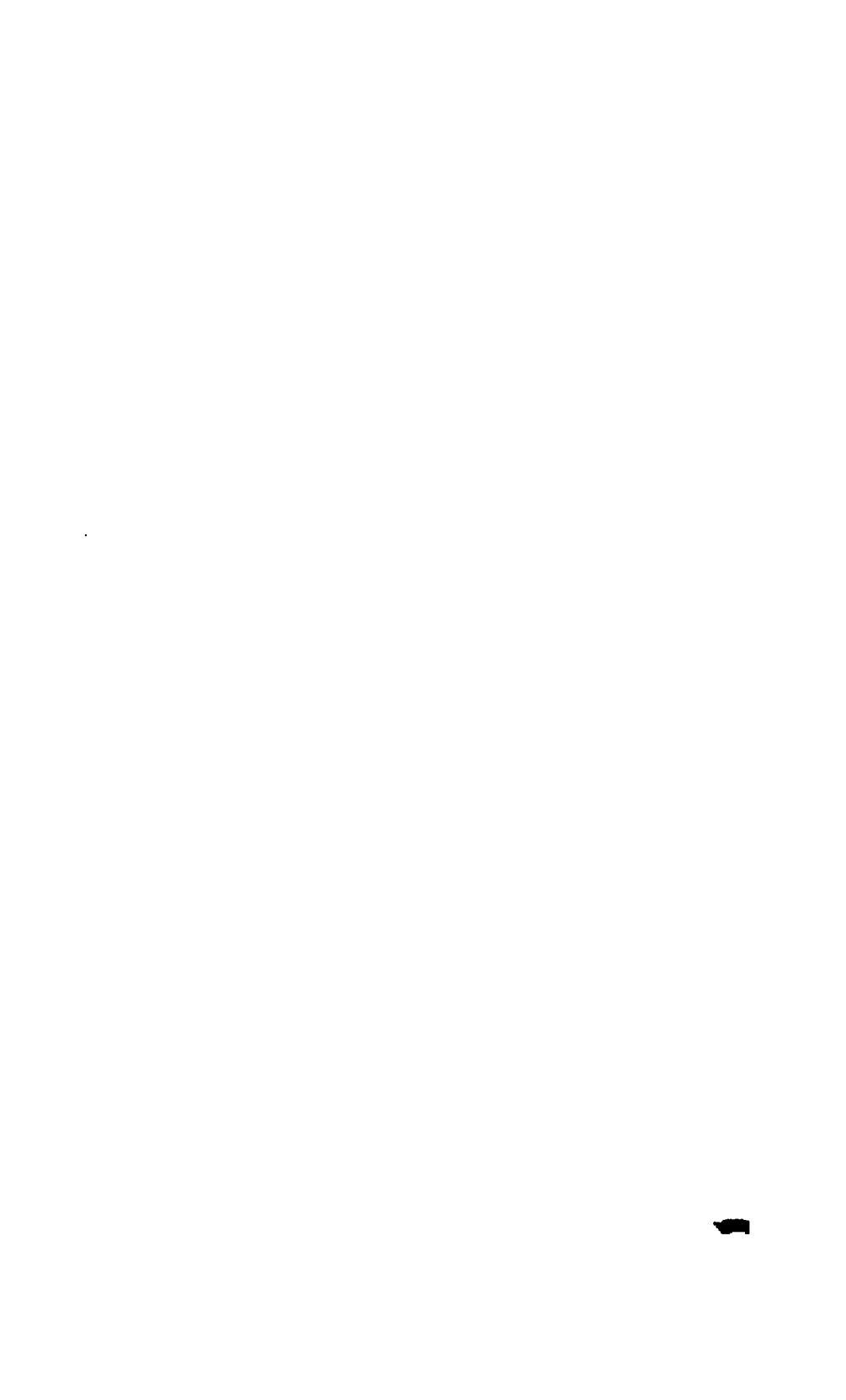
---

XXVI. We have noted these things, in order that when any one finds the term *juris gentium* in the Roman jurists, he may not, as a matter of course, understand that *jus* which is immutable: but may carefully distinguish precepts of Natural Law from those which, in a certain state, are natural; and rights which are common to many peoples independently, from those which contain the bond of human society, [and therefore are truly *juris gentium*].

But this is to be noted, that if by this *jus gentium* improperly so called, or by the law of one people, a mode of acquiring property be introduced without any distinction of citizen and stranger, this, of course, gives a right to foreigners also: and if the person be prevented from taking possession of the right, there may arise a wrong which gives a just occasion of war.

END OF VOLUME I.

AUG 3 1918







**BOUND**

**JUN 29 1951**

**UNIV. OF MICH.  
LIBRARY**



UNIVERSITY OF MICHIGAN



3 9015 01416 9042

*[Faint, illegible handwritten text]*

**DO NOT REMOVE  
OR  
MUTILATE CARD**

